88-841

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

DOROTHY A. STEVENS,

Petitioner,

v.

DOROTHY WRIGHT TILLMAN, CLASCILE BROUGHTON, DEBORAH LEE JOHNSON, ANGELA SLATE, CURTIS SLATE, MARY E. TILLERY, CHERYL MORRIS, GLADYS HAMPTON, MATTIE TARVER, EMMA BARBER, a/k/a EMMA LIDDELL, a/k/a EMMA PROCTOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether 42 U.S.C. §1985(3) provides a remedy to a white principal of a predominantly black school against a black activist and a group of black parents who have criminally assaulted, intimidated, harrassed and terrorized the principal, causing her to flee her school, as part of a campaign to force the Chicago Board of Education to transfer the principal solely because of her race.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Dorothy A. Stevens, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on August 18, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The District Court rendered two reported opinions, 568 F.Supp. 289 (1983) (Appendix D) and 661 F.Supp. 702 (1986) (Appendix C), and two unreported opinions dated November 2, 1984 and December 16, 1986 all of which are appended hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 18, 1988. This Petition for Certiorari was filed within 90 days of that date. No rehearing was sought. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Constitutional Provisions and Statutes Involved

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. §1985(3)

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as

an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

Jurisdiction over plaintiff's action brought under 42 U.S.C. §1985 was conferred on the District Court by 28 U.S.C. §1331, and 28 U.S.C. §1343.

Plaintiff, Dorothy Stevens was the principal of Mollison Elementary School in Chicago from its opening in 1962 until 1981. In December 1980, defendant, Dorothy Tillman, was elected president of the Mollison School Local Advisory Council, a parent-teacher association sponsored by Chicago's Board of Education. Stevens was white. Tillman and the other Defendants, like almost all the students at Mollison, were black. *Stevens v. Tillman*, Nos. 87-1031 and 87-1200, Slip Op. at 1-2 (7th Cir. Aug. 18, 1988).

Until December, 1980, Stevens had always enjoyed the confidence and respect of her superiors at the Board of Education, her staff at the Mollison School, and the parents and children of the Mollison community. Until December, 1980, no one had ever called her a racist nor ever suggested she was running her school like a plantation. (T.572, 573.)

As president of the Mollison School Local Advisory Council, Tillman, with the help of her Co-Defendants, launched a racially motivated campaign to discredit and remove Stevens. *Stevens v. Tillman*, Nos. 87-1031 and 87-

1200, Slip Op. at 21 (7th Cir. Aug. 18, 1988) ("... the jury would have inferred that Tillman had race on her mind when trying to get rid of Stevens.") *Stevens v. Tillman*, 661 F.Supp. 702, 707 (N.D. Ill. 1986) ("... a reasonable juror could find that the requisite racial animus existed for each defendant and that but for the racial animus the parents would not have acted in the same manner.") Tillman and her Co-Defendants appeared before the Board of Education and repeatedly charged that Stevens was being "racist", and that their "children feel as though they are on a plantation", and urged the Board that because "she is a racist, she must go". (Complaint, Exhibit A.) Tillman falsely charged that Stevens called them "a bunch of welfare mothers, a bunch of welfare children", and had told nine out of ten mothers that their child needed a "psychological". *Stevens v. Tillman*, Nos. 87-1031 and 87-1200, Slip Op., at 4 (7th Cir. Aug. 18, 1988). Tillman threatened that "by any means necessary we are going to remove her". (Complaint, Exhibit A)

Defendants organized a boycott of Mollison. Mollison parents physically occupied the school, disrupted classes, and physically prevented children from entering. (T.874.)

On January 25, 26 and 27, Tillman and other Defendants publicly read an "eviction notice" to Stevens and physically occupied Stevens' office, barring her entry (T.885). Stevens fled in terror. (T.886, 888.) The next day, when Stevens came to school with a police escort (T.901), Tillman shouted and screamed in the hallways of the school: "Get her out of here or we are going to come and get her. We are going to come and get her ourselves." (T.906.) Stevens again fled and never returned to Mollison. (T.907.) In the course of this scheme, Tillman and others were arrested no less than four times.

Stevens was granted a medical leave of absence. (T.910.) She stayed at a friend's home in Florida for approximately two months (T.914). During that time she often awoke in a cold sweat and was caused to change her nightclothes and bedsheets (T.913). She developed high blood pressure.

The Board of Education's informal unwritten policy was not to transfer principals like Stevens who were in good standing. (T.49-86, 124-147.) Rather than return Stevens to Mollison, the Chicago Board of Education transferred her to the Clinton School as an interim principal. (T.915.) She was thereafter transferred to the Pierce School (T.922.) She retired at age 65, five years earlier than she had planned.

REASONS FOR GRANTING A WRIT OF CERTIORARI

I.

The Appellate Court ignored the fact that a racially motivated denial of equal protection is the essence of a §1985(3) claim when it held that Stevens could not recover because she was not deprived of any property right.

In the case at bar, Stevens both pleaded and proved a class-based racial animus. *Stevens v. Tillman*, Nos. 87-1031 and 87-1200, Slip Op., at 21 (7th Cir. Aug. 18, 1988); *Stevens v. Tillman*, 661 F.Supp. 702, 707 (N.D. Ill. 1986) (Appendix B7-8) (". . . a reasonable jury could find that the requisite racial animus existed for each defendant". . .)

The Appellate Court, however, found that Stevens could not recover because "she was not deprived by the Board [of Education] of any entitlement". *Stevens v. Tillman*, Nos. 87-1031 and 87-1200, Slip Op. at 21 (7th Cir. Aug. 18, 1988). In other words, the Appellate Court held that Stevens would only have a §1985(3) claim if she had a property right in remaining principal of a particular school. This holding is a serious error calling for Supreme Court review. The Appellate Court completely ignored the fact that "the constitutional right to equal protection with regard to public employment does not depend on the existence of a property interest in that employment". *Poolaw v. City of Anadarko*, 660 F.2d 459, 462 (10th Cir. 1981). The issue is whether or not Stevens was denied equal protection, not whether she was deprived of a property right.

It has long been settled that purposeful discrimination on the basis of race denies equal protection of the laws. The central purpose of the equal protection clause is to guarantee that all persons, whether black or white, stand equally before the law. *Regents of University of California v. Bakke*, 438 U.S. 265, 289-294, 299, 307 (1978). The fact that Stevens is white and the Defendants are black

is inconsequential because "the guarantee of equal protection cannot mean one thing when applied to an individual of one color and something else when applied to a person of another color." *Regents of University of California v. Bakke*, 438 U.S. at 289-290, (1978). Therefore, it is important that the Supreme Court accept this case in order to correct the glaring constitutional error made by the Appellate Court and to reaffirm that the very essence of § 1985(3) is to remedy all denials of equal protection.

II.

Racially motivated conspiracies aimed at affecting or influencing state action are actionable under 42 U.S.C. §1985(3).

The elements of a § 1985(3) violation are: "(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." *United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 828-29 (1983). Accord, *Griffin v. Breckenridge*, 403 U.S. 88, 102-103 (1971).

Element number (2) requires "some racial, or perhaps otherwise class-based, invideously discriminatory animus". *United Brotherhood of Carpenters & Joiners of America, Local 610 AFL-CIO v. Scott*, 463 U.S. 825, 835 (1983). No state involvement is required where the private conspiracy is aimed at interfering with rights constitutionally protected against private and official encroachment. *Griffin v. Breckenridge*, 403 U.S. 88, 101-107 (1971). But, where the conspiracy interferes with a right protected only against state encroachment, such as the Fourteenth Amendment's right to equal protection of the laws, the Supreme Court has concluded that a violation of §1985(3) is not proved

unless "the State is involved in the conspiracy *or* that *the aim* of the conspiracy *is to influence* the activity of *the State*." *United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 830 (1983).

A. The Appellate Court's denial of relief to a white principal solely because she suffered injury at the hands of racially motivated blacks rather than injury at the hand of an official contravenes the express statutory language of §1985(3), and this Court's holding that § 1985(3) provides a remedy for harm done by private parties who conspire together with the aim of causing discriminatory state action.

Defendants' own stated purpose was to remove Stevens as principal of Mollison. Their campaign brought them before the Board of Education. They clearly had the aim of influencing state action. And, in fact they succeeded in their goal, since Stevens was ultimately assigned to another school. Irrespective of these facts, the Appellate Court held that Stevens could not recover, despite this Court's rationale in *United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott*, because she "did not suffer injury at official hands." *Stevens v. Tillman*, Nos. 87-1031 and 87-1200, Slip Op. at 21 (7th Cir. Aug. 18, 1988). The insistence on state action being the direct cause of the wrong is contrary to the express language of §1985(3) which makes actionable any conspiracy which "directly or indirectly" deprives a class of persons of equal protection of the laws, or has the "purpose of preventing or hindering" any state from guaranteeing equal protection of the laws. 42 U.S.C. §1985(3). There is nothing inherent in the phase "equal protection of the laws" used in §1985(3) that requires the deprivation to come from the state itself, *Griffin v. Breckenridge*, 403 U.S. 97, 101-02 (1971).

Section 1985(3) not only supports the Fourteenth Amendment but also implements the Thirteenth Amendment. The reach of §1985(3) to deprivations that do not come from the state itself is the direct outgrowth of Congress' power under the Thirteenth Amendment. "Congress has the power under the Thirteenth Amendment. . . to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971) quoting *Jones v. Alfred H. Mayer*, 392 U.S. 409, 440-41, (1968).

The Appellate Court's decision is further contrary to *Scott's* express conclusion that the aim of influencing the activity of a state is sufficient for a §1985(3) violation. *United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 830 (1983). The only reported post-*Scott* case interpreting this language gave it its obvious meaning. *See, Waller v. Butkovich*, 605 F.Supp. 1137, 1142 (M.D.N.C. 1985) (motion to dismiss a §1985(3) action denied because "a Section 1985(3) violation for a conspiracy. . . may be asserted where the object of the conspiracy is to influence the action of the state as well as where the state is actively involved in the conspiracy" and proof of a private conspiracy to deprive others of police protection necessary to the exercise of first amendment rights and of their right to travel "may constitute a conspiracy to influence the activity of the state"). To adopt the Appellate Court's construction of §1985(3), where fourteenth amendment rights are involved, would render it a mere duplication of §1983's color of state law requirement, and deprive it of any independent importance or use. The Supreme Court has rejected such a construction. Section 1985(3) was not intended to be, nor should it be reduced to a lifeless clone of Section 1983. *Griffin v. Breckenridge*, 403 U.S. 88, 99 (1971).

In *Griffin*, the Supreme Court interpreted §1985(3) by

resort to the statutory scheme Congress intended when it passed the Civil Rights Act of 1871, 17 Stat.13. *Id.* at 98-99. Section 1 of this Act, which is now 42 U.S.C. §1983, addressed deprivations under color of state law. Section 2 of the Act, which was the parent to §1985(3), addressed activities interferring with or influencing state authorities. Section 3 of the Act provided for military action where private lawlessness rendered state authorities unable to protect against denials of equal protection of the laws. *Id.* at 99. Given these three provisions, the *Griffin* Court found it almost impossible to believe that Congress intended, by the use of the dissimilar language of §1985(3) simply to duplicate the coverage of its companion provisions. *Id.*

B. The determinative issue before this Court is whether the Defendants' racially motivated campaign to cause the Board of Education to remove Stevens from Mollison violates §1985(3). This issue stands alone and is unencumbered by any disputed issues of fact.

Except for the legal issue of state involvement, Stevens has proven all the elements of a §1985(3) violation. Defendants' purpose was to remove Stevens from her position as principal of Mollison because she was white. That they conspired and acted in furtherance of this conspiracy is shown by the fact that they assaulted Stevens, intentionally barred her access to her office, forced her to flee from Mollison in fear of her life, and made false discrediting statements before the press, the Board of Education, and the public. There is "no doubt Stevens suffered injury at Tillman's hands". *Stevens v. Tillman*, Nos. 87-1031 and 87-1200 Slip Op. at 23 (7th Cir. Aug. 18, 1988). The existence of a *prima facie* racial class-based animus was found by the Appellate Court, *Id.* at 21, and by the District Court, *Stevens v. Tillman*, 661 F.Supp. 702, 707 (N.D. Ill. 1986) (Appendix B-8). If the Supreme Courts' holding in *Scott*,— that §1985(3) only requires that the defendants have had

the aim of influencing state action,—is followed, Stevens has a remedy under §1985(3) for the deprivation of her rights to equal protection of laws by Defendants' racially motivated campaign to discredit her. *Harris v. Harvey*, 605 F.2d 330, 338 (7th Cir.1979), (A racially motivated campaign to discredit and damage constitutes a denial of equal protection). Indeed, Defendants' racially discriminatory actions ultimately led to Stevens being assigned elsewhere. (See Argument I, *supra*.)

C. The congressional intent of §1985(3), and this Court's construction of that statutory provision, are important federal questions in need of Supreme Court guidance.

It is appalling for a white principal, like Stevens, who has been professionally and personally mauled by a black activist led group, to be denied relief by the Appellate Court on as uncertain a basis as the Appellate Court expressed:

> This wheel will continue to turn. Changing interpretation has been the only constant about §1985(3). See *Grimes v. Smith*, 776 F.2d 1359, 1363-1366 (7th Cir. 1985) (tracing the history); *Volk v. Coler*, 845 F.2d 1422, 1435 (7th Cir. 1988) (as if to prove the point, disagreeing with *Grimes*, without discussing it, on the statute's coverage on non-racial, political conspiracies). Which way it will turn is anyone's guess. Strong arguments may be made for making all racially-motivated harms actionable - though whether this should be a federal tort is a legislative question. If Congress spoke to the subject through §1985(3), it disguised its meaning well. We follow the accepted understanding of §1985(3) without pretending to certainty that the understanding is right - either as an interpretation of the law or as a wise rule. (*Stevens v. Tillman*, Nos. 87-1031 and 87-1200, Slip Op. at 22-23 (7th Cir. Aug. 18, 1988.)

No person, white or black, should be left without a remedy, particularly one provided by statute, for real harm suf-

fered, because an appellate court is uncertain concerning the proper interpretation of the law. Stevens has already been a victim of racial prejudice and of an asserted campaign of racially discriminatory, hateful and harmful conduct. She should not now be left a remedyless victim by the Appellate Court's dubious and uncertain decision, a decision the correctness of which the Appellate Court itself expresses doubt about. There is every reason to believe the Appellate Court's decision in this case is in error. Certainly the activity of private marauders would not commonly involve deprivations under "color of law", and yet reaching the conduct of such marauders was one of the very reasons for the existence of §1985(3). The actions of Tillman's gang was certainly reminiscent of the marauders. Is this Civil Rights Act provision to be emasculated and rendered incapable of reaching the harm done by a present day equivalent of a band of marauders? This Court has indicated not. Stevens, and others like her should not be victimized because this Court's message in *United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott*, was either ignored or missed.* These issues involving the congressional intent expressed in §1985(3), and the interpretation of this Court's prior holding in *United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott* are best resolved by a clear statement from the Supreme Court rather than by *ad hoc* consideration in the lower courts.

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* (The Appellate Court's notion that an attempt to influence administrative conduct by activities outside the realm of civilized discourse, is a "political campaign" that is beyond the reach of §1985(3), stems from its failure to grasp the full import of *Scott*. *Stevens v. Tillman*, Nos. 87-1031 and 87-1200, Slip Op. at 21 (7th Cir. Aug. 18, 1988). It would render §1985(3) incapable of providing a remedy for harm caused by a racially-motivated conspiracy solely because the conspiracy, fortuitously, did not succeed in inciting government officials to cooperate.)

D. Stevens is the innocent victim not only of Defendants' racially motivated campaign, but also of the Appellate Court's failure to consider both her equal protection claim and this Court's determination in *United Brotherhood of Carpenters & Joiners of America v. Scott*, that the aim of affecting state action is sufficient for a §1985(3) violation. Supreme Court intervention is thereby necessary for full and proper consideration of the important federal claims Stevens has made.

This case cries out for justice. Stevens was victimized. Until Defendants began their campaign, Stevens enjoyed the confidence and respect of her superiors at the Board of Education and her staff at Mollison. Stevens was not actively seeking out a constitutional claim or the glare of the public spotlight. She would no doubt have been happy to have been left alone to go about her daily activities in relative anonymity. Instead, it was Tillman who sought the public spotlight and, with the other Defendants, tried to impose her whims upon Stevens. In so doing, she made Stevens the innocent victim of her racially motivated scheme and their accompanying criminal acts. The Appellate Court's decision, however, was based on their own restrictive interpretation of what Stevens claimed and their apparent belief that Stevens should have pursued a more settled legal course. *Stevens v. Tillman*, Nos. 87-1031 and 87-1200, Slip Op., at 20-23 (7th Cir. Aug. 18, 1988).

Is there any doubt, if a black person serving as principal in a school attended primarily by whites, located in a white neighborhood, were assaulted, intimidated, harassed, and forced to flee in terror by a white group led by a white political activist and ultimately assigned to another school by the Board of Education as a result of these events, that the Plaintiff's claim would be not only actionable under §1985(3) but also of national importance? Because the Constitution is colorblind, should not Stevens'

claim should be given no less consideration. *Regents of University of California v. Bakke*, 438 U.S. 265 (1978). The Appellate Court, however, gave no consideration to either Stevens' claim that she was denied equal protection of the law or did it heed the Supreme Court's determination in *Scott* that the aim of affecting state action is sufficient for a §1985(3) claim. *United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 830 (1983). These important federal and constitutional questions deserve the type of exhaustive and far-reaching analysis that only this Court can provide.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Seventh Circuit.

BY: _____

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CERTIFICATE OF SERVICE

I hereby certify that I have deposited three copies of this Petition for a Writ of Certiorari in a United States mailbox located at 180 North LaSalle, Chicago, Illinois, on or before 5:00 p.m. on this 16th day of November, 1988, with prepaid postage to:

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 87-1031 and 87-1200

DOROTHY STEVENS,

Plaintiff-Appellant,

v.

DOROTHY WRIGHT TILLMAN, et al.,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 81 C 3588—Ann Claire Williams, *Judge*.

ARGUED SEPTEMBER 9, 1987—DECIDED AUGUST 18, 1988

Before CUMMINGS, COFFEY, and EASTERBROOK, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Dorothy Stevens was the principal of Mollison Elementary School in Chicago between 1962, when it opened, and 1981. Her career at Mollison ended unpleasantly. In December 1980 Dorothy Tillman was elected president of the Mollison School Local Advisory Council, a parent-teacher association sponsored by Chicago's Board of Education. Tillman launched the Council on a crusade to remove Stevens as principal. Tillman and supporters occupied Stevens's office at the school for three days running and served her with an "eviction notice"; they organized a boycott that (they claimed) kept

more than 80% of the students out of school; they distributed handbills, picketed the school, and delivered tirades against Stevens at meetings of the Board of Education. In the spring of 1981 Stevens took five months' paid leave and was replaced as principal by Edith Dervin, whereupon the Local Advisory Council declared victory. When she returned to Chicago from her recuperation in Florida, Stevens was posted to another elementary school as principal. Tillman, by then a well-known figure, was elected to Chicago's City Council; Stevens retired at age 65 in 1985.

This case presents a claim under 42 U.S.C. §1985(3) and two pendent claims under state law, defamation being the leading one. We shall need to decide some difficult questions concerning the difference between "facts" and "opinions" in the law of defamation and the scope of liability under §1985(3) for conspiracies that violate state but not federal law.

I

The sit-in was illegal as trespass, and the boycott was a violation of the state's mandatory-attendance laws. Although the police arrested the parents for trespass in order to clear Stevens's office, the state's attorney chose not to prosecute them, and Stevens is not entitled to enforce these laws herself. The sit-in, during which Stevens was placed in fear for her person, was most likely an assault under Illinois law. An episode in which Tillman, backed by a crowd, shouted "Get her out of here or we are going to come and get her. We are going to come and get her ourselves" would put many a person in fear. For reasons she has kept to herself, Stevens chose not to complain about this; instead she filed suit under 42 U.S.C. §1985(3). Stevens is white. Tillman and her aides, like almost all of the students at Mollison, are black, as is Edith Dervin. Stevens contends that Tillman campaigned to get rid of her on the basis of race, which Stevens believes violates §1985(3) because in the process Tillman violated rights secured by state law. Tillman insists, to the

contrary, that Stevens was dictatorial, condescending, and ineffectual; defects in her performance, and not her race, were the basis of the campaign against her. This attack on Stevens's fitness for her position led Stevens to present two state-law claims under the court's pendent jurisdiction: defamation and inducement to breach of contract.

During the pretrial proceedings, the district court held that all three claims presented triable issues. 568 F. Supp. 289 (N.D. Ill. 1983), modified in part by order of November 2, 1984. The §1985(3) claim is sufficient, the court believed, because it alleges that the defendants (Tillman and other members of the Local Advisory Council) conspired on racial grounds to influence the Board of Education, a governmental body. The libel and inducement claims, the court thought, depend on factual issues that only a jury may resolve. Before the trial got under way, the case was assigned to another judge, who took a different view of things.

After Stevens had presented her case to the jury, the court granted judgment for the defendants on the inducement count under Fed. R. Civ. P. 50(a), finding that the Board of Education had not broken its contract with Stevens, so that the defendants could not be liable for inducing a breach. 661 F. Supp. 702, 712-13 (N.D. Ill. 1986). The court pared back the number of statements the jury would be allowed to consider under the defamation claim, holding that some were not clearly "of and concerning" Stevens and that most of the others to which Stevens objected are constitutionally protected as opinion. *Id.* at 708-11. And although the court allowed the trial of the §1985(3) claim to continue, *id.* at 705-07, it concluded that only proof of violent or unlawful acts would be sufficient to make out a case; to the extent the §1985(3) claim rested on public statements and lobbying, the constitutional right to petition the government for redress of grievances prevented liability. Even this allowance was withdrawn at the end of the defendants' case, when the court dismissed the §1985(3) claim after concluding that Stevens had not been deprived of a federally-protected right.

Nine potentially-defamatory statements went to the jury, which was instructed that it could return a verdict for Stevens only if it concluded that the statement is false and that clear and convincing evidence shows that the speaker knew the statement to be false or acted with reckless disregard for the truth. The jury returned special verdicts answering, statement-by-statement, whether the speech is false; if it is, whether clear and convincing evidence showed that the defendant knew of its falsity or was reckless; if it is false and the speaker acted with the necessary scienter, whether Stevens suffered damages; and, if so, the damages attributable to that statement.

The jury found that at a public meeting of the Board of Education, Tillman made these false statements:

> [O]ne child [in the entire school, covering grades K-8] was doing math at a sixth grade level and he was an eighth grade student, and the rest was below.
>
> She [Stevens] called all the parents a bunch of welfare mothers, a bunch of welfare children.
>
> [O]ne reason we were able to have an eighty-five to ninety percent effective boycott is because nine out of ten mothers in that school have been told by Miss Stevens that their child needs psychological, not to mention some of the other things that she told them.
>
> We have teachers put in the wrong places. That's one of the reason our children are not learning.

The jury also found that Tillman and six other members of the Local Advisory Council prepared and circulated a handbill containing these false statements:

> Her testing system was not working, yet she would not change it.
>
> The results are: only one child doing math on sixth grade level; and the majority of students are reading below grade level.

The evidence showed that 93% of Mollison's students were reading below their expected level—worse than the norm

in Chicago for schools in poor neighborhoods—but not that only one student in the school was up to 6th grade level in math. Although the jury found that these six statements are false, it also answered the question "do you find that there is clear and convincing evidence that the defendant knew the statement to be false when made or acted with reckless disregard for the truth when making that statement?" with "No" for all six.

The judge gave the jury two other statements from the handbill:

> As of today, only half of the students have been tested this year for their levels.
>
> Miss Stevens told several reporters that most of Mollison's parents are on ADC.

The jury found that these statements are true. This left one statement, which Tillman made at the Board of Education's meeting:

> The teachers are afraid of her. . . . They are afraid of Miss Stevens. They have called me one by one and said, "You're absolutely right. We know what's going on, but if we speak up, she will write us up and we will be—then we'll get dismissed from the school."

The jury found that this statement is false and that Tillman either knew it is false or acted with reckless disregard for the truth when making it. (Perhaps the jury deemed it significant that not a single teacher at Mollison testified on the defendants' behalf at trial.) The jury also found that Stevens "suffered damages as a direct and proximate result of" the statement. It fixed these damages at $1.00.

Stevens contends on appeal that the jury, having found liability, was required to set damages at $1 million rather than $1.00. This is fanciful. It may be, as Stevens says, that she was humiliated by the campaign, suffered illness as a result of the vilification, and was led to retire earlier than she had planned to do because no other school held for her the attraction of Mollison, which she had

helped to found. Still, a single statement in the course of an organized protest movement has almost no effect; a jury trying to value the damages attributable to this statement, on the assumption that everything else that transpired is lawful, had little choice but to return the customary figure of $1.00 as nominal damages. Stevens fares no better on the claim of tortious interference with contract. We agree with the district court that the Board did not break its contract with Stevens, see 661 F. Supp. at 712-13, which dooms this claim; we discuss it no further. Stevens argues weakly that the district judge erred by granting a two-month continuance in mid-trial during the illness of one of defendants' lawyers; such matters are committed to the court's discretion. This leaves several contentions, however, each entailing multiple legal issues. Stevens insists that all of the statements should have been submitted to the jury; that she did not have to prove scienter by clear-and-convincing evidence (or at all); and that the defendants violated §1985(3).

Stevens has filed two notices of appeal. No. 87-1031 was filed in mid-trial and challenges the grant of judgment on the interference-with-contract claim at the end of plaintiff's case. No. 87-1200 was filed on entry of the final judgment. We dismiss No. 87-1031 as premature; No. 87-1200, however, brings up the entire case.

II

The district court granted judgment for defendants as a matter of law on two categories of statements: those that did not mention Stevens by name, and those that the court characterized as opinion.

A

Under Illinois law statements that reasonably may be read as referring to someone other than the plaintiff are not actionable. *Chapski v. Copley Press*, 92 Ill. 2d 344, 442 N.E.2d 195 (1982). The district court apparently believed that under *Chapski* only statements referring to

the plaintiff by name are actionable. No Illinois case supports that proposition; insinuation can be as devastating as name-calling. See *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 267 (7th Cir. 1983) (Illinois law). A statement that logically refers to a particular person may be actionable; *Chapski* held that "the words and the implications therefrom [should be] given their natural and obvious meaning" (442 N.E.2d at 200), not that every possible inference is to be indulged in the speaker's favor. The first amendment does not contain a direct-reference requirement, *Saenz v. Playboy Enterprises, Inc.*, 841 F.2d 1309, 1313-17 (7th Cir. 1988), so it is unnecessary to read Illinois law that way to avoid unconstitutionality.

Any error in this respect is harmless, however. Stevens's brief on appeal presses, as her best case of defamation by innuendo, statements Tillman made on December 17, 1980.

> We are having quite a few problems at Mollison.
>
> Only one student at Mollison was doing math at a sixth grade level. The rest are below.
>
> The children are endangered.
>
> Our children are not doing math.

Statements of this sort naturally may be read as slights on the principal. But the first is an empty commentary rather than a statement of fact. (We discuss the "opinion" question more fully below.) The third is true: it refers to Mollison's practice of sending pupils home for lunch, even though the school's neighborhood is a rough one. Stevens contended that the collective bargaining agreement with the teachers' union required the school to be closed for lunch, while Tillman disagreed; in either case, no one doubted that the children were in more danger walking back and forth in the neighborhood than they would have been eating lunch at school. (Edith Dervin, who replaced Stevens, promptly instituted a "modified closed campus" system over the teachers' objection; other elementary schools in Chicago, operating under the same

collective bargaining agreement, used a "closed campus" system.) The second statement in this group is essentially identical to one that the jury found false but not intentionally or recklessly so; another statement of the same character would have fetched the same result. The fourth is along the lines of the second but less specific; if the second is not actionable, neither is the fourth.

B

Another, much larger, category of statements was removed from the jury's purview as "opinion". *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974), holds that the first amendment prohibits attaching civil liability to statements of opinion. Ever since, courts have wrestled with the question "what's an opinion?" and have come up with buckets full of factors to consider but no useful guidance on what to do when they look in opposite directions, as they always do. E.g., *Fudge v. Penthouse International, Ltd.*, 840 F.2d 1012, 1015-17 (1st Cir. 1988); *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446, 452-55 (3d Cir. 1987); *Potomac Valve & Fitting Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1286-90 (4th Cir. 1987); *Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir. 1986) (en banc); *Ollman v. Evans*, 750 F.2d 970, 979-84 (D.C. Cir. 1983) (en banc) (plurality opinion). This is hardly a satisfactory state of affairs. See Note, *The Fact-Opinion Determination in Defamation*, 1988 Colum. L. Rev. 809 (1988).

Gertz requires a court to separate "fact" from "opinion", a task we have carried out when necessary, see *Quilici v. Second Amendment Foundation*, 769 F.2d 414, 418-21 (7th Cir. 1985); *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1129 (7th Cir. 1987), without producing a useful definition of "opinion". The parties press different views on us, but we resist the temptation to come up with a new and "better" definition, in part because fact cannot be separated from opinion by ever-more-elaborate definitions. Every statement of opinion contains

or implies some proposition of fact, just as every statement of fact has or implies an evaluative component. Even the statement "I don't like the color blue" implies a proposition about the speaker's sensibilities; he could be lying about his own dislikes or mistaken in the sense that on further reflection he would say something different about the color blue. The statement "mauve is a lousy color" implies "I don't like mauve", with the same difficulties. The statement "socialism is better than capitalism", seemingly an opinion dependent on the speaker's preferences about control of productive assets, could be false in the sense that the speaker, who holds certain values, might conclude after reflection (and access to data) that capitalism serves his own values better than socialism does. Much modern political and ethical philosophy consists in efforts to demonstrate that statements about justice and other hard-to-pin-down terms may be reduced to less contentious statements that will be accepted (with their logical implications) in a way that produces agreement. Statements of "pure" opinion also may imply or depend on facts. One may say "Jones has a tin ear", implying something about his behavior that may be false. One may say "George Stigler did not deserve the Nobel Prize" because one believes that Frank Knight should have received it; but Knight died before Stigler received the prize, and on learning that there are no posthumous Nobel Prizes this person too might favor Stigler. The statement "no one will ever build a heavier-than-air flying machine" is opinion in 1900 and false in 1905. The statement "Paul Morphy was a better composer than Wolfgang Amadeus Mozart" appears to be an egregiously erroneous statement of either opinion or fact—until you realize that the speaker must have meant "composer of chess puzzles". The statement "2 + 3 = 5", apparently one of "fact", implies something about the speaker's use of "+", particularly that he thinks "+" signifies addition, in base six (or higher). See Saul A. Kripke, **Wittgenstein on Rules and Private Language** 8-24 (1982), for a brief description of the many opinions and related beliefs underlying something as simple as the use of "+". It could be a state-

ment about a very different kind of math—or maybe not a statement about any kind of math. Even axiomatic math cannot yield "factual" (logically true) statements about all interesting arithmetical relations, as Gödel and Turing established. See Ernest Nagel and James R. Newman, **Gödel's Proof** (1958); Gregory J. Chaitin, *Randomness in Arithmetic*, 259 Scientific American 80 (July 1988). The reason Fermat's Last Theorem remains unproven (and unrefuted) may be that it is neither true nor false—just an "opinion" about numbers.

Most efforts to separate "fact" from "opinion" start with the belief that a "fact" is something verifiable, while an opinion is not. The branch of philosophy known as logical positivism is built on the proposition than only what is verifiable is worth debating (more rigorously, that "there are no synthetic *a priori* statements except this one"), but it has fallen on hard times not only because no one can separate the "verifiable" from the "non-verifiable" (was the statement "there are craters on the other side of the moon" an opinion that turned to fact when we gained the ability to put satellites in orbit around the moon?), but also because most philosophers believe that there are useful ways to debate even non-verifiable statements. They may be derived from axioms (or from axiomatic arguments about the "state of nature"); if this treatment is impossible, their implied factual bases may be tested. Courts trying to find one formula to separate "fact" from "opinion" therefore are engaged in a snipe hunt, paralleling the debates between positivist and deontological thinkers in philosophy. Perhaps the Constitution requires the search for this endangered species, but more likely the difference between "fact" and "opinion" in constitutional law responds to the pressure the threat of civil liability would place on kinds of speech that are harmless or useful, not on the ability to draw a line that has vexed philosophers for centuries. See *Ollman*, 750 F.2d at 995-1001 (Bork, J., concurring). It is the cost of searching for "truth"—including the cost of error in condemning speech that is either harmless or in retrospect turns out to be

useful, a cost both inevitable and high in our imprecise legal system—that justifies the constitutional rule. Like other attempts to compare things that can be neither quantified nor reduced to a common metric (how much does the value of free speech "weigh" compared with the value of reputational injury?), this will never yield a rule.

The potential for erroneous condemnation of harmless or beneficial speech should make courts reluctant to embrace unstructured, multi-factor "tests". For the first amendment is valuable only when the speech is threatening and unpopular—for only then would juries condemn speech in the absence of a constitutional rule. If the Constitution protects only moderate speech, it protects nothing. Supercharged rhetoric is part of many political debates, as is the careless and inaccurate accusation; these inevitably injure, yet speech must be protected even when it injures, lest the scope of debate be curtailed. *Hustler Magazine v. Falwell*, 108 S. Ct. 876 (1988). A "balancing test" readily yields to the impulse to stamp out speech "just this one time" in order to punish a particularly crude and unjustified sally; the felt necessities of the day overwhelm the general principle, and a balancing test has no resource to prevent it. The case seems the exceptional one; and the jury—drawn from throughout northern Illinois—may bring to the case sensibilities about "acceptable" speech very different from those prevailing in the Mollison school zone. The prospect of exceptions "for this day and train only" destroys the value of the rule, however. Before adopting a multi-factor approach we should consider, too, a powerful structural objection: the first amendment says that "Congress shall make no law . . . abridging the freedom of speech", not that "Congress shall make no *unwise* law . . .". The State of Illinois is not Congress, but the first amendment applies (through the fourteenth) just the same, and so far as the federal courts are concerned a rule of common law is no different from a statute. Our court has so far refrained from deciding how to go about identifying protected "opinions", see *Brown & Williamson Tobacco Corp. v. Jacobson*, 827

F.2d 1119, 1129 n.3 (7th Cir. 1987), and we are not anxious to settle that question now, unless that is essential.

Before attempting to compare the incomparable, we need to ask whether Illinois would treat the statements in question as defamatory. The first inquiry in any "constitutional case" is whether there is any need to declaim on the meaning of the Constitution. Unless Illinois would treat Tillman's statements as actionable, there is no constitutional defense to consider. The district court assumed that only the first amendment stood between Tillman (and friends) and civil liability. Our reading of Illinois law is different; we do not think the statements characterized as "opinions" are actionable independent of the factual propositions they imply—propositions that were in fact submitted to the jury.

Here is a sample of the statements that the district court found constitutionally-protected as "opinions".

> We found in our investigation that our principal must be removed. . . . Our principal is very insensitive to the needs of our community, which happens to be totally black. She made very racist statements during the boycott. She is a racist. She must go. We cannot have racist people around our children. . . . She made numbers of very racist statements, so many that I would use all of my time to explain to you some of the statements that were made.
>
> Our children are afraid of her. I think discipline is fine. The child must respect the principal; he or she must respect the teachers. But I mean there is no sense—and our children feel as though they are on a plantation. And there is no reason in 1981 why we should have a principal making such racist statements.
>
> The teachers of the school have brought to most of our attention that it has been run as a dictatorship, and we do not need a dictatorship in our children's school. . . . They're being degraded and put down,

> and it's all because of a dictatorship with Miss Stevens.
>
> We have exposed the Mollison pollution. . . . Since 1975, the quality of education has gone down at Mollison School and Miss Stevens has sat and watched it. She did nothing about it. . . . Miss Stevens is insensitive to the children, the parents and the community. We can no longer allow her to destroy our children's minds.

The common law in Illinois follows the **Restatement (Second) of Torts** §566 (1977), which provides:

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

When a statement in the form of an opinion discloses the defamatory facts (or refers to facts in the public record), it is not actionable apart from those facts. See *Horowitz v. Baker*, 168 Ill. App. 3d 603, 523 N.E.2d 179 (3d Dist. 1988); *Stewart v. Chicago Title Insurance Co.*, 151 Ill. App. 3d 888, 503 N.E.2d 580 (4th Dist. 1987), both building on dicta in *Owen v. Carr*, 113 Ill. 2d 273, 277-81, 497 N.E.2d 1145, 1148-49 (1986). (In *Costello v. Capital Cities Communications, Inc.*, 153 Ill. App. 3d 956, 966-67, 505 N.E.2d 701, 707-09 (5th Dist. 1987), a divided panel concluded that *Stewart* had misinterpreted *Owen*; *Horowitz* followed *Stewart* without further discussion, and we are convinced that these cases are on solid ground.) *Horowitz* is particularly instructive, because the speech in question there made a number of derogatory statements ("sleazy", "cheap", "pull a fast one", "secret", and "rip-off") about the plaintiff's purchase of bricks from a city. These statements readily could have been read to imply the speaker's knowledge of bribery, extortion, or some other crime. The court nonetheless held them not actionable under state law, because a newspaper earlier had published the facts on which these characterizations had been based.

Tillman and her confederates disclosed the principal bases of their condemnations. The students were doing poorly at math; Stevens employed a method of testing that her witnesses at trial conceded was improper; the students were forced to walk home and back again at lunch; Stevens was a strict disciplinarian; Stevens thought poorly of the pupils ("welfare children") and their prospects (they needed "psychologicals"); and on and on. Most of these factual averments were submitted to the jury, which found several false but not intentionally so; others were found true (or were not pressed by Stevens). All that remained was the characterization, which under Illinois law is not actionable apart from the underlying statements of fact.

One subject was removed from the jury's purview without any (evident) submission of underlying fact: the repeated claim that Stevens is a "racist". This was offered as a body blow, an attack on fitness and integrity. Stevens argues that it is libel *per se* under Illinois law. Tillman also declared that Stevens "made numbers of very racist statements, so many that I would use all of my time to explain to you some of the statements that were made." Stevens either did or did not make repugnant statements; Tillman said that she had, yet offered no examples. One is entitled to wonder how such an assertion can be "opinion." Perhaps Tillman meant only to characterize statements of the "welfare-mother" variety; this interpretation would be an opinion rather than a declaration of fact. The words also might have implied something like: "Stevens made to me statements similar to those that Gov. Ross Barnett made while standing in the schoolhouse door, and she holds the same views about black people that Barnett did." That would be a statement of fact, and could be quite wrong.

Curiously, Stevens does not contend that the jury should have been allowed to consider whether Tillman's oratory implied to listeners that Stevens had made the kind of statements that all ears find repellant. Stevens contends that the epithet "racist" is itself actionable because it marks her as unfit to be principal of a public school and

because Tillman used the term (in conjunction with the claim that she had conducted an "investigation") to imply possession of derogatory information. The results of the "investigation", such as it was, were spread before the jury. We do not think a court of Illinois would agree that the term itself is actionable, so again we do not consider any constitutional argument.

Illinois has competing doctrines: first, that statements impugning one's professional competence are actionable without further proof of injury; second, that "mere name-calling" is not actionable. Compare *Costello v. Capital Cities Media, Inc.*, 111 Ill. App. 3d 1009, 445 N.E.2d 13 (5th Dist. 1982) ("lying leadership" is actionable per se), affirmed in relevant part after later appeal, 153 Ill. App. 3d 956, 505 N.E.2d 701, 708 (1987); *Erickson v. Aetna Life & Casualty Co.*, 127 Ill. App. 3d 753, 469 N.E.2d 679 (2d Dist. 1984) (calling chiropractor's treatment "unreasonable & unnecessary" is actionable per se); with, e.g., *Horowitz* ("sleazy" and "rip-off" are name-calling); *Valentine v. North American Co. for Life & Health Insurance.*, 60 Ill. 2d 168, 328 N.E.2d 265 (1974) ("lousy agent" is name-calling); and *Skolnick v. Nudelman*, 95 Ill. App. 2d 293, 305, 237 N.E.2d 804, 810 (1st Dist. 1968) ("nut", "mishuginer", and "screwball" are name-calling). We shall not pretend to be able to harmonize these cases. "Liar" and "unnecessary medical treatment" imply a greater degree of certainty than does "lousy agent" or "rip-off" and therefore, we suppose, imply access to additional supporting facts, but there is hardly a bright line. We do not think it necessary to wrestle with the subject in light of *Owen v. Carr*, the most recent word from the Supreme Court of Illinois, which held that "[l]anguage to be considered defamatory must be so obviously and naturally harmful to the person to whom it refers that a showing of special damages is unnecessary." 497 N.E.2d at 1147. *Owen* ruled that, as a matter of law, an accusation that an attorney filed a complaint "deliberately to intimidate" the defendants was not actionable, although the comment implied professional wrongdoing.

Accusations of "racism" no longer are "obviously and naturally harmful". The word has been watered down by overuse, becoming common coin in political discourse. Tillman called Stevens a racist; Stevens issued a press release calling Tillman a "racist" and her supporters "bigots". Formerly a "racist" was a believer in the superiority of one's own race, often a supporter of slavery or segregation, or a fomenter of hatred among the races. Stevens, the principal of a largely-black school in a large city, obviously does not believe that blacks should be enslaved or that Jim Crow should come to Illinois; no one would have inferred these things from the accusation. Politicians sometimes use the term much more loosely, as referring to anyone (not of the speaker's race) who opposes the speaker's political goals—on the "rationale" that the speaker espouses only what is good for the jurisdiction (or the audience), and since one's opponents have no cause to oppose what is beneficial, their opposition must be based on race. The term used this way means only: "He is neither for me nor of our race; and I invite you to vote your race." When Stevens called Tillman a "racist", Stevens was accusing Tillman of playing racial politics in this way rather than of believing in segregation or racial superiority. That may be an unfortunate brand of politics, but it also drains the term of its former, decidedly opprobrious, meaning. The term has acquired intermediate meanings too. The speaker may use "she is a racist" to mean "she is condescending to me, which must be because of my race because there is no other reason to condescend"—a reaction that attaches racial connotations to what may be an inflated opinion of one's self—or to mean "she thinks all black mothers are on welfare, which is stereotypical". Meanings of this sort fit comfortably within the immunity for name-calling.

Language is subject to levelling forces. When a word acquires a strong meaning it becomes useful in rhetoric. A single word conveys a powerful image. When plantation owners held blacks in chattel slavery, when 100 years later governors declared "segregation now, segregation

forever", everyone knew what a "racist" was. The strength of the image invites use. To obtain emotional impact, orators employed the term without the strong justification, shading its meaning just a little. So long as any part of the old meaning lingers, there is a tendency to invoke the word for its impact rather than to convey a precise meaning. We may regret that the language is losing the meaning of a word, especially when there is no ready substitute. But we serve in a court of law rather than of language and cannot insist that speakers cling to older meanings. In daily life "racist" is hurled about so indiscriminately that it is no more than a verbal slap in the face; the target can slap back (as Stevens did). It is not actionable unless it implies the existence of undisclosed, defamatory facts, and Stevens has not relied on any such implication.

III

The district court instructed the jury that it could return a verdict for Stevens only if it found by clear and convincing evidence that any falsehood had been uttered with knowledge of the lie or recklessness toward the truth. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-86 (1964). It did so on two grounds: that Stevens is a public official, and that the speakers were exercising their right to petition the government for redress of grievances.

Stevens relies on *Hutchinson v. Proxmire*, 443 U.S. 111, 133-36 (1979), for the proposition that public criticism does not transmute the target into a "public figure". Granted. But Stevens was a public *official*—just like the commissioner who supervised the police department in *New York Times v. Sullivan*—whether or not she was a public *figure*. Her performance as a public official was open to public comment. *Rosenblatt v. Baer*, 383 U.S. 75, 85-86 (1966). Stevens was not an elected public official, but as principal she possessed great discretion over the opera-

tion of Mollison School. How she used that discretion was the subject of legitimate public debate. Perhaps there should be a "limited-purpose public official" just as there is a "limited-purpose public figure", see *O'Donnell v. CBS, Inc.*, 782 F.2d 1414, 1417 (7th Cir. 1986), for even senior bureaucrats such as Stevens should not be required to forego all privacy interests in order to render public service just because those running for public office do. If there be such a doctrine, however, it would not assist Stevens. The statements at issue here dealt with the way Stevens ran Mollison School, not with her private life.

Too, as the district court held, the statements in question either were made at meetings of the Board of Education or were part of a campaign to influence the Board. The statements made directly to the Board are governed by the *New York Times* standard under the holding of *McDonald v. Smith*, 472 U.S. 479 (1985). Those made as part of the campaign to whip up public support in order to put pressure on the Board to remove Stevens are equally protected. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-12 (1982); cf. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Premier Electrical Construction Co. v. National Electrical Contractors Ass'n, Inc.*, 814 F.2d 358, 371-76 (7th Cir. 1987). The first amendment prohibits efforts to ensure "laboratory conditions" in politics; speech rather than damages is the right response to distorted presentations and overblown rhetoric. A campaign to influence the Board of Education is classic political speech; it is direct involvement in governance, and only the most extraordinary showing would permit an award of damages on its account. The district court did not err in instructing the jury that only evidence satisfying the *New York Times* standard would permit an award of damages.

IV

We come at last to the claim under §1985(3), which was the basis of federal jurisdiction in this case. The statute provides:

> If two or more persons . . . conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities . . . from giving or securing to all persons . . . the equal protection of the laws; . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

This statute addresses private acts—going "in disguise on the highway" is a reference to the M.O. of the Ku Klux Klan—yet condemns only deeds that "deprive" the victim of "the equal protection of the laws, or of equal privileges and immunities under the laws", something within the domain of government exclusively. This admixture of private and public action has befuddled courts ever since. See, e.g., *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979); and *United Brotherhood of Carpenters v. Scott*, 463 U.S. 825 (1983), the principal modern cases in a long chain that has included declarations of unconstitutionality, revivals, and reinterpretations. It is hard to come up with an enduring interpretation of such an opaque statute, when the Court tries on the one hand to avoid turning all state torts into federal offenses and on the other to give some content to a statute that if read naturally speaks only to state action and therefore duplicates §1983.

As we understand the Supreme Court's contemporary cases, §1985(3) reaches three kinds of conduct:

1. Racially-motivated private conspiracies to deprive persons of rights secured to all by federal law. (Whether any other motivation is covered, and whether federal "law" for this purpose is limited to the Constitution itself, are open questions.)

Griffin is an example to the extent the conspiracy deprived the plaintiffs of their constitutional right to engage in interstate travel.

2. Racially-motivated private conspiracies to deprive persons of rights secured to all by state law, where the deprivation interferes with the exercise of a federally-protected right. A cross-burning (trespass and assault) by the Klan is an example to the extent the threat of violence induces the targets to refrain from exercising federally-assured rights, such as the rights to travel, to associate or speak, and to vote.

3. Racially-motivated conspiracies to deprive persons of rights secured only against governmental action (such as the right of free speech), provided the defendants are either "state actors" or seeking to influence the state to act in a prohibited way. *Scott*, 463 U.S. at 831-34; *Cohen v. Illinois Institute of Technology*, 524 F.2d 818, 828-30 (7th Cir. 1975) (Stevens, J.).

The statute does not, however, create any of the rights at issue. *Novotny*, 442 U.S. at 372; *Scott*, 463 U.S. at 833. The plaintiff must locate a right independently secured by state or federal law and then show (if only state law is at issue) that the offense deprives him of a right secured by a federal rule designed for the protection of all. See also *Griffin*, 403 U.S. at 102-03, for other elements of the §1985(3) tort.

Stevens does not argue that the defendants' efforts to induce the Board to get rid of her "aim[ed] at a deprivation of the equal enjoyment of rights secured by the law to all" (*Griffin*, 403 U.S. at 102). The standard federally-secured rights—to speak, worship, travel, and so on—are not at stake. Stevens' position as principal was put at risk, but neither state nor federal law creates a "property" interest in a principalship. The Board of Education was free to transfer Stevens if it chose, and under *Bigby v. City of Chicago*, 766 F.2d 1053 (7th Cir. 1985), there is

no independent federal right in having an especially desirable public job. There may well be a federal right in ability to practice the common occupations of the community, see *Truax v. Raich*, 239 U.S. 33, 38-42 (1915); *Scott v. Village of Kewaskum*, 786 F.2d 338, 340 (7th Cir. 1986), but that right was not in jeopardy. Moreover, Stevens does not contend that Tillman violated any of her rights under state law (such as the right to be free from assault) for the purpose or with the effect of inducing her to surrender or refrain from exercising rights secured by federal law.

The claim under method (3) is more plausible: Stevens argues that Tillman and supporters plotted to get rid of her on racial grounds; and although this is a right secured against state rather than private action, Stevens was trying to influence the Board of Education, a state actor. We very much doubt that §1985(3) properly may be used to penalize racially-motivated political campaigns, any more than the antitrust laws may be used to penalize deceitful campaigns to obtain protection from competition. See *Noerr* and related cases discussed in *Premier*. We need not pursue this, however, because the Board of Education took no action; Stevens did not suffer injury at official hands; since she was not "deprived" by the Board of any entitlement, she may not recover on the line of reasoning approved in *Scott*.

In the end, Stevens's injury was imposed directly by the private conduct of Tillman and associates—the sit-in, the verbal threats, the slander, and so on. Her argument is that §1985(3) supplies a remedy for abuse heaped on someone on racial grounds, even if there is neither state action nor a deprivation of any federally-secured entitlement (other than the entitlement, employed here in a perfectly circular way, to be free of racially-motivated abuse). We must assume, given the posture of the case (judgment at the close of the evidence), that the jury would have inferred that Tillman had race on her mind when trying to get rid of Stevens. Still, no case in the Supreme Court has used §1985(3) in this way, and only one appellate deci-

sion, *Life Insurance Co. of North America v. Reichardt*, 591 F.2d 499 (9th Cir. 1979), has done so. *Reichardt* preceded both *Novotny* and *Scott* and is inconsistent with them, as well as with *Cohen* in this circuit. Among cases from the Supreme Court see, e.g., *Ex parte Yarborough*, 110 U.S. 651, 657 (1884) (parallel criminal statute properly used to penalize private terror that affected the right to vote for a member of Congress); *United States v. Waddell*, 112 U.S. 76 (1884) (same statute used to penalize deprivation of homestead interest secured by federal law); *Logan v. United States*, 144 U.S. 263, 285 (1892) (federal right of persons in federal custody to be free from attack); *United States v. Guest*, 383 U.S. 745, 755-60 (1966) (federal statutory right to use public accommodations, plus constitutional right to travel); *Griffin* (right to travel). Many cases—all before *Griffin*, to be sure—say that without the federal "hook" §1985(3) and cognate criminal laws do not provide relief for ordinary criminal assaults and batteries, even if the aggressor acted with a racial motive. E.g., *Waddell*, 112 U.S. at 79-80. *Reichardt*, the only modern departure from this understanding, has been ignored even in the Ninth Circuit. *Havas v. Thornton*, 609 F.2d 372, 374 (9th Cir. 1979) (the plaintiff must show a deprivation of rights secured by the Constitution or federal law). But cf. *Abrams v. 11 Cornwell Co.*, 695 F.2d 34, 41-42 (2d Cir. 1982) (pre-*Scott* case suggesting willingness to treat violation of state law alone as an adequate basis of a §1985(3) claim).

This wheel will continue to turn. Changing interpretation has been the only constant about §1985(3). See *Grimes v. Smith*, 776 F.2d 1359, 1363-1366 (7th Cir. 1985) (tracing the history); *Volk v. Coler*, 845 F.2d 1422, 1435 (7th Cir. 1988) (as if to prove the point, disagreeing with *Grimes*, without discussing it, on the statute's coverage of non-racial, political conspiracies). Which way it will turn is anyone's guess. Strong arguments may be made for making all racially-motivated harms actionable—though whether this should be a federal tort is a legislative question. If Congress spoke to the subject through §1985(3),

it disguised its meaning well. We follow the accepted understanding of §1985(3) without pretending to certainty that the understanding is right—either as an interpretation of the law or as a wise rule.

No doubt Stevens suffered injury at Tillman's hands. No doubt Tillman's methods were crude. Perhaps Stevens had lingered beyond her time at Mollison School. Public officials (Tillman was then only aspiring to office) should live by high standards rather than asking "what can I get away with?". Civilized discourse should be the aspiration of us all. The jury found that Tillman uttered quite a few falsehoods, and the discourse was neither dispassionate nor reasoned. To the extent Tillman followed the precept that "nothing succeeds like excess" she was within her rights under the first amendment and the Illinois law of libel, save for the $1.00 the jury found she owes. To the extent Tillman and associates put Stevens in fear for her safety, causing physical and mental distress, the right avenue was a suit for assault under state law. That would have been a straightforward claim. Stevens chose to bring a federal suit under a statute that required her to jump through more hoops than she could manage. She may take comfort from the dollar, for certainly the verdict and this opinion do not vindicate Tillman's methods. They show, however, the limited reach of federal law.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

Dorothy A. STEVENS, Plaintiff,

v.

Dorothy TILLMAN, et al., Defendants.

No. 81 C 3588.

United States District Court,
N.D. Illinois, E.D.

Nov. 26, 1986.

MEMORANDUM OPINION AND ORDER

ANN C. WILLIAMS, District Judge.

The plaintiff Dorothy A. Stevens ("plaintiff"), a white woman who formerly was an elementary-school principal in a primarily-black school, brought this action against certain black parents and alleged that the parents successfully sought to remover her from her position as principal solely because of her race.[1] After lengthy discovery, unsuccessfull settlement attempts and many other delays, the case finally reached the trial stage before this court starting in September of 1986. After the plaintiff completed her case in chief, the defendants moved this court for a directed verdict on all three counts of the complaint pursuant to rule 50(a) of the Federal Rules of Civil Procedure. For the reasons discussed in this Memorandum Opinion and Order, the court grants the defendants' motion for a directed verdict on Count III, but denies the motion for a directed verdict on Counts I and II. The court will address each of the counts in order.

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[1] The facts of this case are detailed fully in Judge Nordgerg's Memorandum Opinion and Order denying the defendants' motion to dismiss. *See Stevens v. Tillman*, 568 F.Supp. 289, 291 (N.D.Ill.1983).

I

Count I–42 U.S.C. § 1985(3)

[1] Count I of the plaintiff's complaint alleges that the defendants conspired to deprive the plaintiff of her civil rights in violation of 42 U.S.C. § 1985(3). Judge Nordberg set forth the five required elements of a § 1985(3) claim in his Memorandum Opinion and Order denying the defendants' motion to dismiss. *Stevens*, 568 F.Supp. at 292. The plaintiff must establish the following five separate elements:

> (1) a conspiracy
>
> (2) motivated by racial or other class-based invidious discriminatory animus and
>
> (3) established for the purpose of depriving, directly and indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws;
>
> (4) that the conspirators committed some act in furtherance of the conspiracy;
>
> (5) that the plaintiff was either injured in his person or property or was deprived of having and exercising any right or privilege of a citizen of the United States.
>
> *Id. (citing Griffin v. Breckenridge*, 403 U.S. 88, 102-3, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971)).

In their motion for a directed verdict, the defendants make two distinct arguments for dismissal of this count.[2] When considering these arguments, the court must

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[2] The defendants did not raise any of the arguments discussed in this Memorandum Opinion and Order in their motion to dismiss, nor did Judge Nordberg address these arguments in writing his Memorandum Opinion and Order on that motion. *See Stevens*, 568 F.Supp. at 289.

make its determination on the merits of the argument based on the standards for deciding a motion for a directed verdict. The court must view all the evidence, taken as a whole, in the light most favorable to the nonmoving party. *Selle v. Gibb*, 741 F.2d 896, 900 (7th Cir.1984). If the evidence would permit a reasonable juror to find in favor of the nonmoving party, a directed verdict is improper. *United States v. An Article of Device*, 731 F.2d 1253, 1257 (7th Cir.1984). The court will consider each of the defendants' arguments in turn.

A. The Defendants' First Amendment Right to Petition the Government for Redress

The defendants first assert that they cannot be held liable under § 1985(3) because their allegedly unlawful acts and words were part of their effort to petition the government for redress. They argue that they were exercising their First Amendment right to petition when they spoke before the Board of Education, leaf-letted, picketed and boycotted the school.

[2] It is the law in this circuit that a defendant's exercise of the right to petition precludes an action under § 1985(1). *See Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1345-46 (7th Cir.1977), *cert. denied*, 434 U.S. 975, 98 S.Ct. 533, 54 L.Ed.2d 467 (1977). Over the objection of the plaintiff, this court finds that the valid exercise of the right to petition also undermines an action under § 1985(3). When discussing § 1985(1), the Seventh Circuit expressed a general concern that it not interpret the statute so as to interfere with established constitutional rights.[3] The Seventh Circuit did not base its holding purely on a concern derived from the language of § 1985(1). Instead, the court applied the basic principle this court must apply in construing § 1985(3), i.e., that it seek a reasonable construction

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[3] "But we are not free lightly to impute to Congress an intention to invade the right to petition." *Stern*, 547 F.2d at 1344.

consistent with its legislative purpose so as to avoid serious constitutional doubt. *Id.* at 1344. The fact that this case involves a discrimination claim against a state as opposed to a federal official is irrelevant to the court's determination. The public criticism of governmental policy, whether state or federal, and those responsible for government operations is at the very core of the constitutionally-protected area of free speech. *Cf. Stern*, 547 F.2d at 1342. Since the essence of both *Stern* and this case is that a public citizen complained to the supervisor of a government employee about that employee's performance in his/her job, the court finds no reason to distinguish the cases. *See Stern*, 547 F.2d at 1345 (a taxpayer lodged a complaint about an IRS agent through the proper channels).

The allegations that the defendants' made defamatory statements about the plaintiff do not change the court's holding in this regard. In *Stern*, the Seventh Circuit expressly held that the mere fact that the defendant's petition to the government involved false statements did not change its ruling regarding § 1985(1). *Id.* As in *Stern*, the potential chill of the right to petition engendered by a knowing-falsity rule moves this court not to adopt such a rule. *Id.*

In *National Association for the Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982), the Supreme Court defined the circumstances in which an individual's activities are protected by the right to petition. The Court determined that peaceful, "nonviolent" activities are protected, but that "violence" is not. *Claiborne Hardware Co.*, 458 U.S. at 915-16, 102 S.Ct. at 3426-27. Specifically, the court held that the speeches made and non-violent picketing done during a boycott of local merchants in Mississippi were entitled to protection under the First and Fourteenth Amendments. *Id.* at 907, 102 S.Ct. at 3422. In so holding, the Court recognized that the express purpose of the

Mississippi boycott was to influence governmental action, and affirmed the importance of a nonviolent, politically-motivated boycott as a means to effectuate change in governmental policies and practices. *Id.* at 914, S.Ct. at 3426.

[3] In this case, the defendants' objective was to have the plaintiff removed as principal at the Mollison School by the Chicago Board of Education. Stated differently, the defendants were unhappy with the way a governmental employee was performing on the job and petitioned her supervisor through various means to change the status quo. This kind of activity is at the core of the First Amendment right to petition the government for a redress of grievances. As already stated, it matters not that the defendants allegedly defamed the plaintiff in petitioning their government for redress. *See supra* at 705. The sole question for the court's consideration at this juncture is whether the defendants' activities could be characterized as "violent" or "nonviolent" within the meaning of *Claiborne Hardware Co.*

For purposes of § 1985(3), the court finds that the First Amendment protects many of the activities alleged in the complaint under Count I. These protected activities include the following:

(1) the publication of defamatory statements both through leaflets and news media (Complaint at 3, ¶ 6(A));

(2) the appearance in groups at various locations, including the offices of the Chicago Board of Education, for purposes of demanding the removal of the plaintiff as principal (Complaint at 3, ¶ 6(B));

(3) holding meetings with various Board of Education officials (Complaint at 3, ¶ 6(D));

(4) causing a student boycott of the school for several days (Complaint at 4, ¶ 6(E)).

With respect to these activities, the court finds the cases cited by the plaintiff distinguishable from this one either because they are not § 1985 cases or because the defendants did not raise the right to petition as a defense to a § 1985 claim. *See Fisher v. Shamburg*, 624 F.2d 156 (10th Cir.1980) (right to petition not an issue); *Harris v. Harvey*, 605 F.2d 330 (7th Cir.1979), *cert. denied*, 445 U.S. 938, 100 S.Ct. 1331, 63 L.Ed.2d 772 (1980) (a § 1983 claim to which the right to petition was not raised as a defense); *Life Insurance Co. of North America v. Reichardt*, 591 F.2d 499 (9th Cir.1979) (right to petition not an issue). The court reemphasizes that the basis for its holding regarding the protection of these activities is that they involve the right to petition in conflict with an alleged § 1985 claim. *See supra* at 705.

However, the complaint also alleges that the defendants appeared at the elementary school and trespassed on school grounds and corridors. Complaint at 3, ¶ 6(C). The plaintiff has also introduced evidence at trial that some of the defendants at one point were in the principal's office and instructed the plaintiff to leave. In doing so, Dorothy Tillman ("Tillman"), one of the defendants present during the scene at the principal's office, testified that the plaintiff was "frightened" during the incident. The defendants claim that their activities surrounding this incident are also constitutionally protected. The court recognizes that it cannot merely pass on to the jury the question of whether the Constitution protects this activity. The court has a responsibility as the interpreter of the Constitution to resolve the question of whether these activities are "nonviolent" within the meaning of *Claiborne Hardware Co. See, e.g., Plato v. Roudebush*, 397 F.Supp. 1295, 1306 (D.Md.1975) (the judiciary's authority to enforce its interpretation of the Constitution is not diminished by the fact that the legal issue is close or difficult; whether the Constitution requires a particular result is a manifestly judicial function).

The court, however, is uncomfortable with the prospect of deciding this constitutional issue based merely on the record before it. The Supreme Court repeatedly has emphasized that constitutional questions should not be decided except upon a full record and after adequate hearing. *See, e.g., Cowgill v. California*, 396 U.S. 371, 372, 90 S.Ct. 613, 614, 24 L.Ed.2d 590 (1970) (the Court dismissed an appeal where the appellant did not present evidence on the constitutional question at trial nor urge any standard at trial for determining the issue). The court is aware that the parties could not reasonably foresee that this particular constitutional issue would arise at trial and that the parties have not briefed this issue. Consequently, the court will reserve ruling on this question until the close of all evidence in the case and until the parties have fully briefed the issue.[4]

B. The Existence of Racial Animus

[4] The defendants also argue that, even if the plaintiff does have a right to relief under § 1985(3), she has failed to show that the defendants acted with the requisite racial animus. *Citing Griffin*, 403 U.S. at 101-02, 91 S.Ct. at 1798. According to the defendants' argument, the plaintiff must show that *that* defendant entered into a conspiracy to remove the plaintiff because she was white. *Citing Selzer v. Fleisher*, 629 F.2d 809, 813-14 (2d Cir.1980), *cert. denied*, 451 U.S. 970, 101 S.Ct. 2046, 68 L.Ed.2d 348 (1981).

Based on the evidence the court has heard up to this point, however, the court, viewing that evidence in a light most favorable to the plaintiff, finds a reasonable juror

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[4] In so holding, the court notes the existence of an Illinois statute which provides that entering government-supported land after receiving notice that such entry is forbidden is criminal trespass. *See* Ill.Rev.Stat. ch. 38, ¶ 21-5 (1985). The court also notes that a person commits criminal assault in Illinois when, without lawful authority, the person engages in conduct which places another in reasonable apprehension of receiving a battery. *See* Ill.Rev.Stat. ch. 38, ¶ 12-1 (1962).

could find that the requisite racial animus existed for each defendant and that but for that racial animus the parents would not have acted in the same manner. With respect to the defendant Tillman, the court does not find it necessary to list the specific statements or acts of Tillman the court relies on in support of this holding. Deciding the question of whether a "racial . . . invidiously discriminating animus"[5] existed involves evaluating all the circumstances surrounding each statement or act, considering the background of the defendant and judging the credibility of her testimony in this regard. After considering these and other relevant factors, the court cannot direct a verdict on the grounds that Tillman did not possess the requisite racial intent.

The question of whether the other defendants had that same intent is a more difficult issue, but the court reaches the same conclusion. In making this determination, the court places special reliance on the fact that all of the other defendants were present at the meeting before the Board of Education on January 14, 1981. At that meeting, Tillman discussed her views concerning the plaintiff and alleged among other things that the plaintiff was a "racist." *See* Complaint, Exhibit A at 38. According to the evidence presented, the other defendants silently listened to Tillman and at times shouted words of encouragement. Defendants Curtis Slate and Cheryl Morris gave their speaking time before the Board to Tillman. Defendant Gladys Hampton spoke after Tillman and stated that the school was being run like a "dictatorship." *Id.* at 43.

In light of this incident at the Board as well as all the circumstances surrounding the boycott at the school, the court again cannot direct a verdict based on the lack of racial animus with respect to the defendants other than Tillman. In so holding, the court abides by the settled

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[5] *Griffing*, 403 U.S. at 102, 91 S.Ct. at 1798.

principle that if it has doubts about whether to grant a motion for directed verdict, the better practice is to deny the motion and let the jury return a verdict. *See Etling v. Sander*, 447 F.2d 593, 594 (7th Cir.1971); 5A J. Moore W. Taggart & J. Wicker, Moore's Federal Practice ¶ 50.05[3] (2d ed. 1986).

For the foregoing reasons, the defendants' motion for a directed verdict on Count I at the close of the plaintiff's case in chief is denied.

II
Count II–Defamation

In Count II, the plaintiff alleges that the defendants maliciously defamed the plaintiff in certain statements made before the Board of Education, other statements made to reporters or on television shows, and various flyers that the defendants distributed. The defendants, in their motion for a directed verdict on Count II, argue that this count should be dismissed for a number of reasons. The court again will address each of the defendants' arguments in turn.

A. Statements Not Of and Concerning the Plaintiff

The defendants first argue that a number of the allegedly defamatory statements do not mention or refer to the plaintiff in any way, and that therefore the statements are not actionable. The current Illinois standard employed in examining statements alleged to be defamatory in set forth in *Chapski v. Copley Press*, 92 Ill.2d 344, 65 Ill.Dec. 884, 442 N.E.2d 195 (1982). Under *Chapski*, the court is to consider a written or oral statement in its context, with the words and the implications there-from given their natural and obvious meaning. *Chapski*, 65 Ill.Dec. at 888, 442 N.E.2d at 199. If, as so construed, the statement may reasonably be innocently interpreted or reasonably be interpreted as referring to someone other than the plaintiff, it cannot be actionable per se. *Id.* The preliminary

determination of whether the statements are actionable is a question of law to be resolved by the court in the first instance. *Id.*

[5] In this regard, the first statements at issue are those made by Tillman before the Board of Education on December 17, 1980. *See* Complaint, Exhibit B. Tillman was informing the board of the "problems" at the school. *Id.* The only statement made of or concerning the plaintiff at that time was the statement "we went to the principal." Tillman made no arguably defamatory remarks about the plaintiff at this meeting. Consequently, the court rules that as a matter of law the statements made at the December 17, 1980 meeting did not defame the plaintiff.

[6] The court makes the same ruling with regard to all of the flyers attached to the complaint as Exhibits C and D except for the flyer entitled "We have exposed the Mollison pollution; now we must find the Mollison solution." Only the latter flyer mentions the plaintiff by name. All of the others fail to mention the plaintiff explicitly, and the court cannot reasonably construe these others to defame the plaintiff.

B. Statements Constitutionally Protected as Opinions

The defendants also argue that the First Amendment insulates a number of statements from the reach of libel law because they are statements of opinion, not fact. *Citing Gertz v. Welch*, 418 U.S. 323, 339-40, 94 S.Ct. 2997, 3006-07, 41 L.Ed.2d 789 (1974); *Woods v. Evansville Press Co., Inc.*, 791 F.2d 480, 487 (7th Cir.1986). Since this is an issue of law, the court cannot leave this question for the jury to decide. *See Ollman v. Evans*, 750 F.2d 970, 978 (D.C.Cir.1984), *cert. denied*, 471 U.S. 1127, 105 S.Ct. 2662, 86 L.Ed.2d 278 (1985).

[7] The parties do not dispute that, when deciding the constitutional fact/opinion issue, the court must weigh four factors in light of the totality of the circumstances:

(1) whether the statement has a precise meaning for which a consensus of understanding exists, or whether it is indefinite and ambiguous;

(2) whether the statement is capable of objective verification as true or false;

(3) whether, considering the full context of the statement, the average person would infer that the particular statement has a factual context;

(4) whether the broader context or setting in which the statement appears signals that the statement is fact or opinion.

Id. at 979. *Accord Brown & Williamson v. Jacobson*, 644 F.Supp. 1240, 1256 (N.D.Ill.1986) (Hart, J.).

The court, however, is not to apply this four-part test in a wooden, mechanical fashion. Rather, the court is to use the four-part test to assist it in evaluating the totality of the circumstances surrounding the statement. *See Ollman*, 750, F.2d at 979.

[8] In light of the law on this issue, the court agrees with the defendants that many of the allegedly defamatory remarks made concerning the plaintiff are constitutionally protected as opinion.[6] First, the court considers a portion of the statements made by Tillman before the Board of Education on January 14, 1981. Specifically, the court finds the following statement to be constitutionally protected under the totality-of-the-circumstances test:

> We found in our investigation that our principal must be removed. And we are going to do whatever is necessary to remove her, and we will call it to you, the Board members, to investigate and to remove her. Our principal is very insensitive to the needs of our community, which happens

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[6] The court discusses the reasons for its findings later in this Memorandum Opinion and Order. *See infra* at 710-11.

> to be totally black. She made very racist statements during the boycott. She is a racist. She must go. We cannot have racist people around our children. . . . She made numbers of very racist statements, so many so I would use all of my time to explain to you some of the statements that were made.
> Complaint, Exhibit A at 38.

The court also finds the following statement by Tillman made at the same meeting to be protected:

> We had two alternative sites, and our alternative sites are still in place. We are right now looking for those alternative sites because if Miss Stevens is not removed, we will be pulling our kids out again. She is a very racist woman. She is not good for the community, Dr. Smith. Not only that, Miss Stevens is so insensitive, not only to the children but to the mothers. . . . She runs that school like a plantation.
>
> *Id.* at 39-40.

The following statement made before the Board on the same date is also protected:

> So what we are saying at Mollison is that Miss Stevens must go. By any means necessary we are going to remove her. Our children are afraid of her. I think discipline is fine. The child must respect the principal; he or she must respect the teachers. But I mean there is no sense–and our children feel as though they are on a plantation. And there is no reason in 1981 why we should have a principal making such racist statements.
>
> *Id.* at 40.

The court also finds that the following statement made by the defendant Gladys Hampton before the Board on January 14, 1981 is a statement of constitutionally-protected opinion:

> The teachers of the school have brought to most of our attention that it has been run as a dictatorship, and we do not need a dictatorship in our chil-

dren's school. . . . They're being degraded and put down, and it's all because of a dictatorship with Miss Stevens.

Id. at 43-44.

Attached as part of Exhibit C to the complaint is a flyer entitled "We have exposed the Mollison pollution; now we must find the Mollison solution." The flyer does mention the plaintiff by name, but the court holds that the following excerpts from that flyer are protected as statements of opinion:

> We have exposed the Mollison pollution. . . . Since 1975, the quality of education has gone down at Mollison School and Miss Stevens has sat and watched it. She did nothing about it. . . . Miss Stevens is insensitive to the children, the parents and the community. We can no longer allow her to destroy our children's minds. She must go. . . .
>
> If this is what she feels, maybe that's why our children are not learning. She must go!
>
> The parents refuse to accept "Steven's Law" anymore. We can't sit by and allow our school and our children's education to continue to go down hill.
>
> In our investigation we found Miss Stevens to be the main problem. She can't be part of the solution. Miss Stevens must go. We are in the process of removing Miss Stevens.
>
> Complaint, Exhibit C.

The plaintiff alleges that a number of statements made by Tillman to reporters were defamatory, including the statements "I don't know if she is responsible for what she is saying," "Miss Stevens is the major obstacle in the path of Mollison's improvement" and "Miss Stevens is miseducating our children."[7] *See* Complaint, Exhibits E, F and G.

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[7] The other statements made by Tillman to reporters are similar to statements already discussed in this Memorandum Opinion and Order.

The complaint also alleges that the defendants accused the plaintiff of being a "racist," "being insensitive to the needs of Mollison pupils" and running the Mollison School "like a plantation." Complaint at 6, ¶ 20. The court finds that the First Amendment protects each of these statements as well.

These disputed statements are merely forms of hyperbole and metaphor. They are not objectively verifiable, but instead are statements which are vague and ambiguous. *See e.g., Buckley v. Littell*, 539 F.2d 882, 890-94 (2d Cir.1976), *cert. denied*, 429 U.S. 1062, 97 S.Ct. 785, 786, 50 L.Ed.2d 777 (1977) (calling plaintiff "fascist" is protected). The social context in which the statements were made was one in which no reasonable listener or reader would construe these statement as statements of fact. In so holding, the court takes special note of the fact that oftentimes during the examination of witnesses, plaintiff's counsel asked the witness if in the witness' *opinion*, it was true that the plaintiff was a "racist," that the plaintiff "ran the school like a plantation," or that the plaintiff was "miseducating" the children.

As discussed earlier, the purpose of the activities of the defendants was essentially to petition their government of redress of a grievance they had with their local school. In applying the totality-of-the-circumstances test the court considers it appropriate to factor in the First Amendment values underlying the defendants' activities. *See Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1304 (8th Cir.1986). Speech about government and its officers, about how well or badly they carry out their duties, lies at the very heart of the First Amendment. *Id.*

The plaintiff contends that since the defendants did not disclose the facts which formed the basis of their opinion at the time they voiced their opinion, their opinions are actionable. *Citing Howell v. Blecharczyck*, 119 Ill.App.3d 987, 75 Ill.Dec. 500, 511, 457 N.E.2d 494, 505 (1st Dist.

1983) (an opinion implying alleged undisclosed defamatory facts is actionable). The basis for this contention reaches back to the Restatement (Second) of Torts § 566 which provides the following:

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

In response to this argument, the court first notes that for many of the opinions voiced by the defendants, the defendants also mentioned some of the reasons for their opinion in the nature of facts surrounding the conditions at the school. Second, and more importantly, this court finds that the inquiry suggested by the Restatement Second is already incorporated in the totality-of-the-circumstances test applied by this court. *See Ollman*, 750 F.2d at 984-85 (the four-part test is a sufficient aid in determining whether a statement implies the existence of undisclosed facts).

In support of her argument that Tillman's statement that the plaintiff is a "racist" is not protected, the plaintiff points to a recent case in this district which held that the First Amendment did not protect the statement "they're liars." *Citing Brown & Williamson*, 644 F.Supp. at 1258. The court, however, finds this case distinguishable for the following reasons. In that case, the court held the assertion that Brown & Williamson ("B & W") is a "liar" had a precise core meaning that was verifiable. *Id.* at 1256. The defendant Jacobson charged the B & W falsely denied using the kind of advertising described by the defendant. By determining whether B & W did use such advertising, one could determine whether it lied when it denied doing so. In this case, regardless of what the defendants disclosed to this court, the court could not objectively state that the plaintiff is a "racist." The other cases cited by the plaintiff

are also distinguishable from the case at bar.[8]

[9] With respect to those other statements made by the defendants and alleged in the Complaint, the court finds the First Amendment does not provide protection for them as opinions. Those unprotected statements include the following:

> (1) " . . . one child was doing math at a sixth-grade level and he was an eighth grade student, and the rest was below." Tillman, January 14, 1981, Exhibit A.
>
> (2) "She called all the parents a bunch of welfare mothers, a bunch of welfare children." Tillman, January 14, 1981, Exhibit A.
>
> (3) "One reason we were able to have an eighty-five tc ninety percent effective boycott is because nine out of ten mothers in that school have been told by Miss Stevens that their child needs psychological, not to mention some of the other things she told them." Tillman, January 14, 1981, Exhibit A.
>
> (4) "The teachers are afraid of her. . . . They are afraid of Miss Stevens. They called me one by one and said 'You're absolutely right. We know what's going on, but if we speak up, she will write us up and we will be–then we'll get dismissed from the school. . . . ' We have teachers put in the wrong places. That's one of the reasons our children are not learning." Tillman, January 14, 1981, Exhibit A.
>
> (5) "The children are not being tested when they're

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[8] The cases cited by the plaintiff in which "pro-Nazi" and "bigot" were held actionable were both decided before *Gertz* the Supreme Court case establishing protection for opinions. *See Afro American Publishing Co. v. Jaffe*, 366 F.2d 649 (D.C.Cir.1966) ("bigot"); *Christopher v. American News Co.*, 171 F.2d 275 (7th Cir.1948) ("pro-Nazi"). In *Welner v. Minnesota State Junior College*, 487 F.2d 153 (8th Cir.1973), the court merely held that the plaintiff had a due process right to a hearing to address the racist charge which led to his discharge. The court did *not* state the plaintiff could sue the declarant for making such a statement.

supposed to be tested." Hampton, January 14, 1981, Exhibit A.

(6) "Her testing system was not working, yet she would not change it. The results are: only one child doing math on 6th grade level and the majority of the students are reading below grade level. As of today, only half of the students have been tested this year for their levels.... Miss Stevens told several reporters that most of Mollison's parents are on ADC." Flyer, Exhibit C.[9]

(7) "Miss Stevens is sick. She's under doctor's care...." Tillman, statement to reporter of *Chicago Defender*, Exhibit E.

(8) "Miss Stevens is using an illegal testing system." Tillman, June 8, 1981.[10]

The court finds each of the above statements to be statements of precise meaning which are objectively verifiable.

C. Innocent-Construction Rule

The defendants correctly state that Illinois law provides that under the "innocent-construction" rule, a written or oral statement is to be considered in context, with the words and implications therefrom given their natural and obvious meaning. *See Chapski*, 65 Ill.Dec. at 888, 442 N.E.2d at 199. If, as so construed, the statement may reasonably be innocently interpreted or reasonably interpreted as referring to someone other than the plaintiff it cannot be actionable per se. *Id.*

Applying this standard to the remaining factual state-

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[9] This is the only statement for which the defendants other than Tillman and Hampton can be held liable under Count II.

[10] The defendants allege that the plaintiff never introduced direct evidence of this during her case in chief. Unless the defendant can indicate to the court where she introduced such evidence, the court will dismiss this alleged libel. The court finds the alleged statement "Miss Stevens allowed the school to deteriorate" to be a protected opinion.

ments, the court makes the preliminary determination that these statements are still actionable. The alternative "innocent" constructions proposed by the defendants do not impress this court as being reasonable in light of the evidence.

D. Required Intent for Defamation

[10] The defendants finally argue that, because the defendants were petitioning their government for redress, the plaintiff bears the burden of proving the defendants had actual malice according to the standard set forth by the Supreme Court in *New York Times v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 725-26, 11 L.Ed.2d 686 (1964). *Citing Smith v. McDonald*, 562 F.Supp. 829, 843 (M.D.N.C. 1983), *aff'd*, 737 F.2d 427 (4th Cir.1984), *aff'd*, 472 U.S. 479, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985). For the following reasons, the court agrees.

The defendants made the allegedly defamatory statements while they attempted to convince the Board of Education to act regarding the perceived problems at their local elementary school. The Supreme Court recently held that "the right to petition is cut from the same cloth" as the other guarantees of First Amendment. *See McDonald v. Smith*, 472 U.S. 479, 105 S.Ct. 2787, 2789, 86 L.Ed.2d 384 (1985). In so holding, the Supreme Court affirmed a North Carolina court which held that, although the right to petition does not afford an absolute privilege, it does afford a qualified one. *See Smith*, 562 F.Supp. at 843. *See also Bradley v. Computer Services Corp.*, 643 F.2d 1029, 1033 (4th Cir.1981). Since the right to petition is co-equal to the First Amendment's other guarantees of free expression, the actual-malice standard of *New York Times v. Sullivan* fully protects the right. *See McDonald*, 105 S.Ct. at 2794 (Brennan, J., concurring).

[11] Although the court holds that the actual-malice standard governs this case, the court, viewing the evidence in a light most favorable to the plaintiff, cannot hold that

the requisite intent was not present here.[11] Because the court finds some of the allegedly-defamatory statements are not protected by the First Amendment, the court denies the defendants' motion for a directed verdict on Count II.

III

Count III–Tortious Interference with the Right of Contract

[12] In Count III, the plaintiff alleges that, pursuant to certain Illinois statutes, she enjoyed tenure as a principal and could only be removed from her position after a hearing as provided by law. *Citing* Ill. Rev.Stat. ch. 122, ¶¶ 34-84 and 34-85 (1979). The plaintiff further alleges that by their actions the defendants deprived her of her contractual right to be the principal at the Mollison School.

The evidence, however, does not support the plaintiff's claim that the Board breached its contract with her. The Board still paid the plaintiff in full after she took a medical leave starting on January 29, 1981. The Board then transferred her a few times until she closed her career at Pierce School.

The defendants argue, and this court agrees, that for the plaintiff to recover under Count III she must establish a number of elements, including that the defendants' wrongful conduct caused the Board to breach its contract with the plaintiff. *See Belden Corp. v. Internorth, Inc.*, 90 Ill. App.3d 547, 551, 45 Ill.Dec. 765, 768, 413 N.E.2d 98, 101 (1st Dist.1980). Under Illinois law, the general superintendent with the approval of the Board has the power to transfer a principal to a different school. *See* Ill.Rev.Stat. ch. 122, ¶ 34-8 (1961). While a principal is entitled to written notice before demotion, nothing in the statu-

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[11] The court herein refers the reader to the court's earlier discussion of racial animus. *See supra* at 707. The court does not reach the question of whether the plaintiff is a limited public figure.

tory scheme pohibits the Board from ordering lateral transfers of a principal to positions of similar rank and equal salary. *See* Ill.Rev.Stat. ch. 122, ¶ 10-23.8b (1987). *See also Kolz v. Board of Education*, 576 F.2d 747, 749 (7th Cir.1978); *Classroom Teachers Ass'n. v. Board of Education*, 15 Ill.App.3d 224, 227-28, 304 N.E.2d 516, 519 (1st Dist.1973). A transfer is not the same as a termination and cannot of itself be said to be a breach of contract. *Heying v. Simonaitis*, 126 Ill.App.3d 157, 161-62, 81 Ill.Dec. 335, 339, 466 N.E.2d 1137, 1141 (1st Dist.1984).

In support of her argument that the court should not direct a verdict on this count, the plaintiff points to the testimony of Dr. Nolan, head of the principal's association. Dr. Nolan testified that an unwritten practice of not transferring principals in good standing existed throughout the school district. The court finds that even if such an unwritten practice existed, it would be in express conflict with the already-discussed statutory scheme. *See Chicago Principals Ass'n. v. Board of Education*, 84 Ill.App.3d 1095, 40 Ill.Dec. 381, 384, 406 N.E.2d 82, 85 (1st Dist.1980) (the statutory powers of boards of education cannot be limited by contract). The plaintiff also cites a case for the proposition that if the defendants caused a modification of the contract it is actionable. *Citing Hannigan v. Sears Roebuck & Co.*, 410 F.2d 285, 291-93 (7th Cir.1969). Even if this court assumes that this proposition is correct, the court finds no modification of the contract between the plaintiff and the Board because the plaintiff *never* had the contractual right to stay at the Mollison School.

For the foregoing reasons, the defendants' motion for a directed verdict on Count III is granted.

CONCLUSION

Pursuant to the terms of this Memorandum Opinion and Order, the court grants the motion for a directed verdict on Count III, but denies the motion on Counts I and II.

APPENDIX C

Dorothy A. STEVENS, Plaintiff,

v.

Dorothy Wright TILLMAN, Clascile Broughton, et al., Defendants.

No. 81 C 3588.

United States District Court,
N.D. Illinois, E.D.

July 8, 1983.

MEMORANDUM OPINION AND ORDER

NORDBERG, District Judge.

Plaintiff Dorothy A. Stevens ("Stevens") brought this action for damages and injunctive relief under 42 U.S.C. § 1985(3) against Dorothy Wright Tillman and nine other parents of Mollison Elementary School students ("parents"). Stevens charged defendants with conspiracy to violate her civil rights, defamation and tortious interference with contract. This action is presently before the Court on defendants' motion to dismiss pursuant to Fed.R.Civ.P. 12(b). For the reasons set forth below, this motion is denied.

FACTS

Plaintiff Stevens is an elementary school principal who has been employed by the Chicago Board of Education since 1939. She is currently principal at Pierce Elementary School, but at the time of the events at issue she was principal at Mollison Elementary School. Plaintiff is white and the students at Mollison are primarily black. Defendants include ten members of the Mollison School Advisory Board, headed by Dorothy Wright Tillman.

Plaintiff charges that defendants conspired to remove her from her position as principal solely because of her race. This conspiracy, plaintiff contends, amounted to invidious discrimination in violation of 42 U.S.C. § 1985(3). Plaintiff claims that defendant parents harassed her and

defamed her, organized a boycott of the school and staged a demonstration in her office.[1] As a result of defendants conduct, plaintiff alleges that she suffered high blood pressure which forced her to take a medical leave of absence and ultimately to accept a reassignment from Mollison to Pierce Elementary School.

Stevens filed a four-count complaint for relief on June 26, 1981. Count I seeks damages for injuries suffered in violation of the Civil Rights Act of 1871, 42 U.S.C. § 1985(3). Count II seeks damages for libel and slander. Count III seeks damages for tortious interference of contract. Count IV seeks an injunction enjoining defendants from further harassment of Stevens.

Defendants argue that they organized to protest and attempt to change certain conditions at Mollison which were harming their children. These problems included: the lack of educational progress by their children; an improperly administered testing system which retarded the achievement levels of the children; and a school policy of locking the students out of the building during lunch hour. Defendants argue further that it was only in the course of their dealings with the plaintiff on these issues that they came to oppose her continued assignment as principal of Mollison.

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[1] Specifically, plaintiff Stevens claims that defendants conspired and took part in the following acts: organizing a one-week boycott of the school by many of the students; illegally occupying Stevens' office on several occasions and handing her an eviction notice; and appearing at the Chicago Board of Education to demand her removal. Plaintiff alleges that she was defamed continually throughout the period, including such charges as: that she was a white woman racist; that she ran the school like a plantation; that she was insensitive and not good for the community; that she ran the school like a dictatorship; and that she was destroying the children's minds.

MOTION TO DISMISS

[1] The guidelines to be used in considering a motion to dismiss are clear. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to the relief requested. *Cruz v. Beto*, 405 U.S. 319, 322, 92 S.Ct. 1079, 1081-1082, 31 L.Ed.2d 263 (1979); *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). The United States Court of Appeals for the Seventh Circuit has noted:

> Under the Federal Rules of Civil Procedure, it is well established that, on a motion to dismiss, a complaint must be construed in the light most favorable to the plaintiff, the allegations thereof being taken as true; and if it appears reasonably conceivable that at trial the plaintiff can establish a set of facts entitling him to some relief, the complaint should not be dismissed. *Mathers Fund, Inc. v. Colwell*, 564 F.2d 780, 783 (7th Cir.1977).

A. § 1985(3) *Claim*

[2] To allege a cognizable cause of action under 42 U.S.C. § 1985(3), the complaint must set forth five elements: (1) a conspiracy; (2) motivated by racial or other class-based invidious discriminatory animus; (3) for the purpose of depriving, directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws; (4) that the conspirators committed some act in furtherance of the conspiracy; and (5) that the plaintiff was either injured in his person or property or was deprived of having and exercising any right or privilege of a citizen of the United States. *Griffin v. Breckenridge*, 403 U.S. 88, 102-3, 91 S.Ct. 1790, 1798-1799, 29 L.Ed.2d 338 (1971).

Defendants argue that Steven's civil rights claim should be dismissed due to her failure to allege state action. While § 1985(3) does not expressly require that a defendant act under color of state law, defendants contend there

still can be no claim for relief based on a violation of the Fourteenth Amendment if there has been no involvement by the state. Defendants argue further that Stevens' civil rights claim can only be premised upon the equal protection clause of the Fourteenth Amendment, which requires state action, and therefore it should be dismissed. There is no dispute regarding the absence of state action in the case at bar.

The question of what types of private conduct can be said to deprive individuals of "equal protection of the laws" or of "equal privileges and immunities" is unsettled.[2] The Supreme Court in *Griffin, supra*, opened the door to utilizing § 1985(3) for relief from private action conspiracies to violate the Constitution. The *Griffin* court held that the right to engage in interstate travel and the right to be free of racial discrimination are protected by the Constitution against interference by private action, as well as impairment by state action. It found that Congress was empowered by section two of the Thirteenth Amendment to create a federal cause of action to provide a remedy against private conspiracies motivated by racial animus. No decision has been found which expressly extends the protection of § 1985 to whites as well as nonwhites.

The Supreme Court upheld under the Thirteenth Amendment, the constitutionality of 42 U.S.C. § 1981, as applied to private contracts. *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-460, 95 S.Ct. 1716, 1719-1720, 44 L.Ed.2d 295 (1975). It expanded this ruling in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282, 295-296, 96 S.Ct. 2574, 2575, 2586, 49 L.Ed.2d 493 (1976). The Court ruled that § 1981 prohibits private acts of racial discrimination against whites as well as non-whites. The

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[2] This question is related to the question of how far Congress can constitutionally act under the Fifth section of the Fourteenth Amendment in regulating private conduct.

Court stated:

> Unlikely as it might have appeared in 1866 that white citizens would encounter substantial racial discrimination of the sort proscribed under the Act, the statutory structure and legislative history persuade us that the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves. *Id.* at 295-296, 96 S.Ct. at 2586.

[3] In the instant action, plaintiff alleges that she was denied equal protection of the law and asserts that her Fourteenth Amendment rights have been violated. Complaint for Violation of Civil Rights and Other Relief, ¶ 18 and ¶ 19. Her allegations under § 1985(3), although not strictly within the scope of the *Griffin* private action analysis, are sufficiently broad so as to state a cause of action. The complaint alleges facts which meet the five-part test for § 1985(3) outlined by the Court in *Griffin* which the Court found to be constitutional under the Thirteenth Amendment.

The Seventh Circuit has repeatedly held that state action is required in order to state a § 1985(3) claim premised upon a violation of the Fourteenth Amendment. *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir.1972); *Cohen v. Illinois Institute of Technology*, 524 F.2d 818 (7th Cir.1975); *Murphy v. Mount Carmel High School*, 543 F.2d 1189 (7th Cir.1976); *Williams v. St. Joseph Hospital*, 629 F.2d 448 (7th Cir.1980). Conversely, the Seventh Circuit has stated, "(E)ven absent state action, plaintiffs may make out a § 1985(3) claim if they show that the defendants conspired to deprive the plaintiffs of equal protection of the laws. This requires, according to *Griffin (supra)* . . . a showing of some racial or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Askew v. Bloemker*, 548 F.2d 673 (7th Cir.1976). The Seventh Circuit has also held that defama-

tory remarks that were racially motivated can constitute a denial of equal protection. *Harris v. Harvey*, 605 F.2d 330, 338 (7th Cir.1979).

In the case at bar, plaintiff Stevens has clearly alleged that defendants were motivated by racial discriminatory animus and conspired to deprive her of equal protection. As found by the Court in *Griffin*, the cause of action is constitutional under the Thirteenth Amendment. It would be wholly inconsistent with the spirit of both the United States Constitution and the Civil Rights Act of 1871 to hold that a black plaintiff could bring a claim under § 1985(3) alleging racial discrimination without the existence of state action and a white plaintiff could not. The Supreme Court stated: "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color . . . Racial and ethnic distinctions are inherently suspect and thus call for the most exacting judicial examination." *Regents of University of California v. Bakke*, 438 U.S. 265, 289-290, 291, 98 S.Ct. 2733, 2748, 57 L.Ed.2d 750 (1978).

[4] It follows, therefore, that the instant action can be factually distinguished from the cases cited earlier supporting the necessity of alleging state action in a § 1985(3) claim based on the Fourteenth Amendment. That line of precedent does not address the validity of a claim based on racial discrimination against whites. Also, as previously stated, plaintiff has alleged sufficient facts to state a claim recognized as constitutional under the Thirteenth Amendment. Thus, in an effort to apply both consistency and equity to a developing area of the law, the Court holds that state action is not required in a § 1985(3) claim premised upon racial discrimination of any hue.[3]

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[3] This ruling goes only to Stevens' equal protection claim and does not recognize the existence of a constitutional violation

(Footnote continued on the following page)

Accordingly, defendants motion to dismiss Count I, alleging a violation of 42 U.S.C. § 1985(3), is denied.

B. Defamation Claim

Plaintiff Stevens charged defendants with defamation in Count II of the complaint. The claim is premised upon state law. Therefore, jurisdiction for this count is based upon its pendency with Count I, the § 1985(3) claim. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

Defendants argue that Count II should be dismissed because the alleged defamatory statements [4] were absolutely privileged in that they were made at a meeting of the Board of Education to board members. Defendants argue further that Stevens has failed to properly plead a defamation claim because as a school principal she is a "public official" or a "public figure" and thus the statements are entitled to a qualified privilege. Because of this qualified privilege, defendants argue, Stevens must plead malice and she has not done so. Therefore, they contend that she has failed to state a valid cause of action in Count II.

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3 *(Continued)*

of due process under the Fourteenth Amendment. The Court declines to rule, at this point, on whether a property interest exists in Stevens' assignment to Mollison, but notes that such an allegation would require state action to sustain its validity. The Civil Rights Act of 1871 creates a cause of action for conspiracy to deny equal protection, but not for a conspiracy to deny due process. *Egan v. City of Aurora*, 291 F.2d 706, 708 (7th Cir.1961); *Collins v. Bensinger*, 374 F.Supp. 273 (N.D.Ill.1974), *aff'd*, 506 F.2d 1405 (7th Cir.1974), *cert. den.* 422 U.S. 1058, 95 S.Ct. 2683, 45 L.Ed.2d 710 (1975).

[4] Stevens alleged that defendants defamed her by accusing her of being a "racist", "being insensitive to the needs of Mollison pupils", ruling Mollison "like a plantation," using an "illegal testing system" at Mollison, and allowing the school to deteriorate. Complaint, ¶ 20 and Exhibits A-F.

[5-7] In light of the standards applicable in ruling on a motion to dismiss, *Conley v. Gibson, supra*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), the Court finds that the complaint satisfactorily states a claim for defamation and it is reasonably conceivable that the plaintiff can establish a set of facts at trial entitling her to some relief. *Mathers Fund, Inc. v. Colwell, supra*, 564 F.2d 780 (7th Cir.1977). Stevens, as principal of Mollison School at the time the alleged defamatory statements were made, was not a public official or a public figure, *McCutcheon v. Moran*, 99 Ill.App.3d 431, 54 Ill. Dec. 913, 425 N.E.2d 1130 (1st Dist.1981), and thus no qualified privilege attaches to the statements. The *New York Times Co.* "actual malice" standard is not applicable. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Defendants' argument that the allegedly defamatory statements should be accorded an absolute privilege because they were made at a Board of Education meeting is unsubstantiated. Defendants' reliance on *McCutcheon v. Moran, supra*, is unfounded. The *McCutcheon* court granted an absolute privilege to statements because they were made to a trial committee of the Board of Education and were pertinent to pending litigation. *McCutcheon v. Moran*, 99 Ill. App.3d 421, 54 Ill.Dec. 913, 425 N.E.2d 1130, 1133 (1981). Such was not the case in the instant action.[5]

Accordingly, defendants' motion to dismiss Count II, alleging defamation, is denied.

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[5] Plaintiff's allegations in Count II are clearly sufficient to survive a motion to dismiss. She may even have stated a claim for libel per se because the allegedly defamatory remarks could be found at trial to be directed at her "inability to perform or want of integrity in the discharge of duties of office or employment." *Catalano v. Pechous*, 69 Ill.App.3d 797, 25 Ill. Dec. 838, 387 N.E.2d 714, 721 (1979).

C. Tortious Interference of Contract Claim

[8] Plaintiff Stevens has charged defendants with tortious interference with her right to enjoy the benefits of her employment contract in Count III of the complaint. As in Count II, jurisdiction for this claim is based upon its pendency with Count I, the § 1985(3) charge. *United Mine Workers v. Gibbs, supra,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

Defendants argue that Stevens has failed to satisfactorily allege the required elements of the tort. The Court disagrees.

> The traditional elements of the tort of inducing breach of contract are: (1) an existing contract between the plaintiff and a third party; (2) defendants' knowledge of this contract; (3) an intentional unjustified inducement to breach the contract; (4) a subsequent breach by a third party; and (5) resulting damage to the plaintiff. *Hannigan v. Sears Roebuck and Co.*, 410 F.2d 285, 291 (7th Cir.1969) (citations omitted).

It is undeniable that Stevens is a party to an employment contract with the Chicago Board of Education. It is equally clear, construing the complaint in the light most favorable to plaintiff, that defendants were aware of this contract and intentionally attempted to modify its terms by unjustifiably forcing Stevens to resign her position as principal of Mollison. In light of the Court's rulings above, it is also possible that plaintiff suffered damages because of the defendant's activities.

The only real issue is whether the employment contract has been breached. Considering the limited nature of the facts before the Court, Stevens' reassignment from Mollison following her medical leave of absence will be viewed as a breach for purposes of stating a claim of tortious interference of contract. "There is no legally significant distinction between unabashed third party conduct which induces one party to outrightly repudiate and breach

its contract with another and subtle third party conduct which achieves essentially the same result through the equally questionable means of coercing a contractual modification. Both approaches are equally tortious in nature and similarly interfere with the contractual relationships of others." *Hannigan v. Sears, Roebuck and Co., supra,* 410 F.2d at 291. The instant action arguably falls into the latter category.

Accordingly, defendants' motion to dismiss Count III, alleging tortious interference of contract, is denied.

D. Claim for Injunctive Relief

[9] Plaintiff Stevens seeks an injunction enjoining defendants from further harassment of her in Count IV of the complaint. Defendants have moved to dismiss this count for failure to satisfactorily set forth the prerequisites for injunctive relief. A trial court has broad discretion in balancing the equities of whether to grant or deny injunctive relief. *Hecht v. Bowles,* 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed.754 (1944). In light of the rulings set forth above, the Court deems it inappropriate at this preliminary stage in the case to dismiss the injunction claim.

Accordingly, defendants' motion to dismiss Count IV, seeking injunctive relief, is denied.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss pursuant to Fed.R.Civ.P. 12(b) is denied. IT IS SO ORDERED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOROTHY A. STEVENS,
Plaintiff,

v.

DOROTHY TILLMAN, et al.,
Defendants.

No. 81 C 3588

MEMORANDUM OPINION AND ORDER

At the close of all the evidence, the defendants moved this court for a directed verdict pursuant to Rule 50(a) of the Federal Rules of Civil Procedure on Count I of the complaint.[1] For the following reasons, the court grants the defendants' motion and dismisses Count I.

I

No Federally-Protected Right Actionable Under Section 1985(3)

In Count I of her complaint, the plaintiff Dorothy A. Stevens ("plaintiff") alleges that the defendants conspired to deprive the plaintiff of her civil rights in violation of 42 U.S.C. § 1985(3). Specifically, the plaintiff alleges that the defendants conspired to deprive her of the following rights:

(A) her right under the fourteenth amendment not to be deprived of life, liberty or property without due process of law;

(B) her right of association;

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[1] The court has already granted the defendants' motion for a directed verdict on Count III of the complaint. *See* Memorandum Opinion and Order, No. 81 C 3588 at 25 (November 26, 1986).

(C) her right to be secure in her person;

(D) her right to continue to practice her profession as an educator without illegal interference and to administer the Mollison School in accordance with the laws, policies, rules and regulations of the Chicago Board of Education;

(E) her right to be free from assault and harassment;

(F) her right to be free from libel and slander;

(G) her rights under Article I, Section 2 of the Illinois Constitution to equal protection of the law and not to be deprived of life, liberty or property without due process of the law;

(H) her right under the fourteenth amendment to equal protection of the law;

(I) her right "to come and go and move about freely."

The Supreme Court has held that Section 1985(3) itself creates no rights. *Great American Federal Savings & Loan Ass'n. v. Novotny*, 442 U.S. 366, 376 (1979). It is a purely remedial statute, providing a civil cause of action when some otherwise-defined federal right is breached by a conspiracy in the manner defined by the statute. *Id.*; *Cohen v. Illinois Institute of Technology*, 524 F.2d 818, 828 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Afro-American Police League v. Fraternal Order of Police*, 553 F. Supp. 664, 673 (N.D. Ill. 1982) (Bua, J.). Furthermore, Section 1985(3) only reaches conspiracies to deny the right to equal protection of the law or equal privileges and immunities under the law. *Collins v. Hardyman*, 341 U.S. 651, 660 (1951). Consequently, unless the alleged deprivation concerns both a federally-created right and a right of equality, it is not actionable under Section 1985(3).

The prevailing view as well as the law in this circuit is that Section 1985(3) does not reach conspiracies designed to deny due process of law. *See Egan v. City of Aurora*,

291 F.2d 706, 708 (7th Cir. 1961); *Jennings v. Nester*, 217 F.2d 153, 154 (7th Cir. 1954); *Collins v. Bensinger*, 374 F. Supp. 273, 277 (N.D. Ill. 1974), *aff'd*, 506 F.2d 1405 (7th Cir. 1974); *cert. denied*, 422 U.S. 1058 (1975); *Brosten v. Scheeler*, 360 F. Supp. 608, 614 (N.D. Ill. 1973), *aff'd*, 495 F.2d 1375 (7th Cir. 1974); 3 J. Cook & J. Sobieski, Civil Rights Actions ¶ 13.09[F] at 13-41 n.122 (1985) (cases cited therein). To the extent the cases cited by the plaintiff differ with the prevailing view, *see, e.g., Pendrell v. Chatham College*, 370 F.Supp. 494, 501 (W.D. Pa. 1974) (the court held that the injury to the plaintiff's property constituted the requisite deprivation under Section 1985(3)), the court refuses to follow them. Alternatively, even if this court were to find that a deprivation of due process were actionable under Section 1985(3), the court would still dismiss this count because the plaintiff has failed to establish a deprivation of a liberty or property interest in this case.

The Supreme Court has recognized the right of association as implicit in the first amendment. *See, e.g., Cousins v. Wigoda*, 419 U.S. 477, 487 (1975). The Seventh Circuit has specifically stated that the first and fourteenth amendments may only be asserted as a shield to government action. *See Murphy v. Mount Carmel High School*, 543 F.2d 1189, 1194-95 (7th Cir. 1976). Therefore, the deprivation of a first amendment right cannot form the basis of an independent Section 1985(3) claim. *See id.; Afro-American*, 553 F. Supp. at 673-74. Again, even if such a deprivation properly constituted a basis for a Section 1985(3) claim, the right to association has been defined as the right to join with others to pursue goals independently protected by the first amendment. *See, e.g.*, L. Tribe, American Constitutional Law § 12-23, at 702 (1978). The facts adduced at trial do not establish that the defendants deprived the plaintiff of exercising such a right.

The plaintiff alleges that the defendants deprived her of her right "to be secure in her person." Complaint at 4,

¶ 9. She has failed, however, to cite any federal statute or case to support the existence of such a right. The only federal right based on language such as that used by the plaintiff is found in the Fourth Amendment of the United States Constitution.[2] The court first finds that a fourth amendment violation cannot serve as a requisite deprivation for a Section 1985(3) claim because it does not concern equal protection of the law or equal privileges and immunities under the law. Second, even if the court were to find such a violation to be actionable under this statute, the facts of this case again fail to establish such a violation.

The rights the court has lettered (D) through (G) are all state-created rights. The court has already noted that the plaintiff must allege a deprivation of a federally-created right in order to state a claim under Section 1985(3). *See supra* at 2. Moreover, in a footnote, the Seventh Circuit specifically held that "the right to engage in a lawful trade has been held to be a privilege and immunity of *state* citizenship, and consequently not subject to the protection of the Fourteenth Amendment and its implementing legislation." *See Murphy*, 543 F.2d at 1192 n.2 (citing *Slaughter House Cases*, 83 U.S. 36, 74-75 (1872)) (emphasis added). The court then stated that "this right is therefore not assertable under Section 1985(3)." *Id.*[3] *See also Hack v. Oxford Health Care, Inc.*, 562 F. Supp. 295, 302 (N.D. Ind. 1983) (the court stated that the Supreme Court has never held that the right to any particular employment is a right of national citizenship or derives from any other right created by the Constitution).

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[2] "The right of the people *to be secure in their persons*, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." (emphasis added).

[3] In the same footnote, the court listed the rights and privileges of national citizenship. *See Murphy*, 543 F.2d at 1192 n.2. The plaintiff has not alleged a deprivation of any of those listed rights or privileges.

The plaintiff, however, insists in the face of contrary precedent that a state-created right is actionable under Section 1985(3), and in support she cites *Life Insurance Co. of North America v. Reichardt*, 591 F.2d 499 (9th Cir. 1979). The court in *Life Insurance Co.* held that violations of state-conferred rights and privileges are sufficient to constitute a deprivation of equal protection of the laws for purposes of a Section 1985(3) claim. *Life Insurance Co. of North America v. Reichardt*, 591 F.2d 499, 505 (9th Cir. 1979). *Life Insurance Co.*, however, was decided five months before the Supreme Court case *Great American Savings & Loan Ass'n v. Novotny*, 422 U.S. 366 (1979), in which the Court specifically held that Section 1985(3) provides a civil cause of action when some otherwise-defined *federal* right is breached. *Novotny*, 442 U.S. at 376. In light of the *Novotny* decision, at least two district courts have rejected the holding of the court in *Life Insurance Co. See Shaare Tefila Congregation v. Cobb*, 606 F. Supp. 1504, 1509-10 (D. Md. 1985), *aff'd*, 785 F.2d 523 (4th Cir. 1986), *cert. granted*, 479 U.S. –, 107 S.Ct. 62 (1986); *Thompson v. International Ass'n of Machinists*, 580 F. Supp. 662, 667 (D. D.C. 1984). This court is also bound by a case decided in the Seventh Circuit which states that Section 1985(3) protects federally-created rights. *See Cohen*, 524 F.2d at 828. In light of the foregoing, the court will not adopt *Life Insurance Co.* and consequently rejects the plaintiff's argument in this regard.

The plaintiff also alleges that she was deprived of her right under the fourteenth amendment to equal protection of the law. In order to establish such a claim, the plaintiff must establish a deprivation of the equal enjoyment of an independent federal right. *See Griffin v. Beckenridge*, 403 U.S. 88, 102 (1971) ("the conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all"). As already indicated, the other deprivations alleged by the plaintiff have failed to establish the deprivation of a federally-protected right actionable

under this statute. The plaintiff has failed to show or argue that she was denied any other privilege which was uniformly granted to others.

Finally, the court is unaware of a federal right "to come and go and move about freely" other than the right to engage in interstate travel. Again, the plaintiff has failed to establish that the defendants impaired the exercise of that right.[4]

For the foregoing reasons and because the plaintiff has failed to establish the deprivation of a federally-protected right actionable under Section 1985(3),[5] the court grants the defendants' motion for a directed verdict on Count I.

II

Protected Non-Violent Activity

In this court's Memorandum Opinion and Order in this case dated November 26, 1986, the court ruled that, insofar as the defendants used non-violent means to seek redress from the Chicago Board of Education, the plaintiff could not recover under Count I. However, the court

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[4] The court has been generous in its attempt to discern just what rights the plaintiff is asserting have been violated by the trial that the purpose of the complaint is to give the defendants "notice" of the nature of her claims. *See Conley v. Gibson*, 355 U.S. 41, 47-48 (1957). The court expects, however, that by the time the case reaches the trial stage, the plaintiff's claims would be more refined than at the pleadings stage. In this case, the court's specific requests for precise definition of the Section 1985(3) claim and case law in support repeatedly were met by conclusory arguments on the part of plaintiff's counsel. This as well as the extent of the directed-verdict motions has made the court's rulings on these motions particularly difficult.

[5] In his Memorandum Opinion and Order denying the defendants' motion to dismiss, Judge Nordberg did not address this question although the defendants did raise it in their memorandum in support of their motion. *See Stevens v. Tillman*, 568 F. Supp. 289 (N.D. Ill. 1983).

reserved ruling until the close of the evidence on whether the defendants' occupation of the principal's office on January 27, 1981 crossed the line from non-violent, protected activity to violent, unprotected activity as drawn by the Supreme Court in *National Association for the Advancement of Colored People v. Claiborne Hardware, Inc.*, 458 U.S. 886, 915-16 (1982). But prior to reaching any constitutional questions, federal courts must consider non-constitutional grounds for decision. *Jean v. Nelson*, 472 U.S. 846, 105 S.Ct. 2992, 2997 (1985). Because the court has been able to dispose of the matter on the grounds stated in Part I of this opinion, judicial restraint forecloses the court from reaching the constitutional question of whether the trespass constitutes "non-violence" within the meaning of *Claiborne Hardware Co.*

CONCLUSION

For the foregoing reasons, the court grants the defendants' motion for a directed verdict on Count I.

E N T E R:

_____

ANN CLAIRE WILLIAMS, Judge
United States District Court

Dated: _____

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOROTHY A. STEVENS,
Plaintiff,

v.

DOROTHY WRIGHT TILLMAN, CLASCILE BROUGHTON, *et al.*,
Defendants.

81 C 3588
Judge John A. Nordberg

MEMORANDUM OPINION AND ORDER

This matter is before the Court on defendants' Motion for Reconsideration. Upon reconsideration, having re-examined the briefs and pleadings and with the benefit of the recent Supreme Court case of *United Brotherhood of Carpenters and Joiners of America, Local 610, AFL-CIO v. Paul E. Scott*, 103 S. Ct. 3352 (1983), the Court denies defendants' Motion for Reconsideration, but modifies its prior order in part, as follows:

In its order of July 8, 1983, the Court found that plaintiff's complaint alleges that defendants had engaged in a conspiracy to deprive her of her position as principal of the Mollison School. The conspirational acts alleged included publication of defamatory statements labeling plaintiff as a "racist," appearing at the offices of the Chicago Board of Education to demand the removal of plaintiff as principal without just reason, appearing at the Mollison School and disrupting school administration, meeting with various Board of Education officials to implement procedures contrary to those implemented by plaintiff, and causing a student boycott of the Mollison School. Plaintiff further alleges that all these conspiratorial acts were motivated by a discriminatory animus against the

plaintiff because she is a caucasian. Plaintiff alleges that the conspiratorial acts alleged were performed for the purpose of depriving plaintiff of her right to equal protection and equal privileges and immunities and due process in violation of the Fourteenth Amendment. Plaintiff alleges that as a result of defendants' action she was forced to take a leave of absence from Mollison School. Plaintiff alleges that the above acts constitute a violation of 42 U.S.C. §1985(3).

Defendants have asked the Court to reconsider its denial of their Motion to Dismiss in light of *United Brotherhood of Carpenters and Joiners of America, Local 610, AFL-CIO et al., v. Paul E. Scott*, 103 S. Ct. 3352 (1983), which was rendered three days prior to the Court's July 8, 1983 order but which the Court did not have the opportunity to consider. Defendants contend that the *Scott* case definitely establishes that when a §1985(3) claim is premised upon a Fourteenth Amendment violation, state action must be present. Since the Court's July 8, 1983 order relied on the proposition that "state action is not required in a §1985(3) claim premised upon racial discrimination," (Memorandum Opinion and Order - p. 7), the defendant seeks dismissal in light of the definitive holding of *Scott*.

Some of the reasoning of the Court's order of July 8, 1983 appears to be in error in light of *Scott*. However, *Scott* does not require dismissal of plaintiff's §1985(3) claim, but rather indicates that dismissal would be improper for another reason. Specifically, *Scott* clarifies *Griffen v. Breckenridge*, 403 U.S. 88 (1971), and states that a §1985(3) claim predicated upon the Fourteenth Amendment must allege that

> the state is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the state.

103 S. Ct. at 3356-57.

Applying this standard to the allegations of the instant

complaint, the Court finds that the plaintiff has alleged that the various conspiratorial acts were aimed at influencing the state, *i.e.*, to influence the Board of Education to remove plaintiff as principal of Mollison School. Although the complaint may be inartful, the Court must measure it against the well-established standard for a motion to dismiss and make all inferences favorable to plaintiff. *Sutcliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984). The complaint must be set forth sufficient factual matters to outline the elements of the cause of action or allegations from which an inference fairly may be drawn that evidence on these points will be introduced at trial. *Id.* at 654. The reasonable inferences from plaintiff's allegations are that defendants conspired to influence the Board of Education to remove her from her position because she was caucasian. Such allegations and the inferences fairly drawn therefrom conform to the standard set forth in *Scott*.

CONCLUSION

In accordance with the foregoing opinion, insofar as the Court's order of July 8, 1983, denying defendants' motion to dismiss, relied on the Thirteenth Amendment and its ability to reach purely private action, the order is vacated, nunc pro tunc. Instead, defendants' motion to dismiss is denied because plaintiff has alleged sufficient state action under *Scott*. Therefore, defendants' motion for reconsideration is denied in accordance with the foregoing opinion. The Court's Order of July 8, 1983 is vacated in part, nunc pro tunc, and modified in accordance with the foregoing opinion.

ENTER:

/s/ JOHN A. NORDBERG
JOHN A. NORDBERG
United States District Judge

Dated: November 2, 1984

Supreme Court, U.S.
FILED
FEB 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-841

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DOROTHY A. STEVENS,

Petitioner,

v.

DOROTHY WRIGHT TILLMAN, CLASCILE BROUGHTON, DEBORAH LEE JOHNSON, ANGELA SLATE, CURTIS SLATE, MARY E. TILLERY, CHERYL MORRIS, GLADYS HAMPTON, MATTIE TARVER, EMMA BARBER, a/k/a EMMA LIDDELL, a/k/a EMMA PROCTOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a plaintiff may recover under 42 U.S.C. §1985(3) when she has not shown that an alleged racially motivated conspiracy deprived her of some independent, federally protected right.

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II.

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner's ("Stevens") statement of the case contains mischaracterizations and omissions which seriously distort the record. Without setting forth a full factual statement

below, Respondents (the "Parents") will detail enough of the record to clarify the facts relevant to the Petition for Certiorari ("Petition"). The Parents will also set forth the relevant procedural history of the case, which the Petition ignores.

A. Facts

Stevens misleadingly suggests that the Parents were indisputably motivated by race, and, moreover, that the District Court and Court of Appeals so found. Petition at 3-4, 10. This is incorrect. Not only have the parents emphatically denied racial animus throughout this case, the District Court found Plaintiff's proof of racial animus "doubtful," 661 F.Supp. 702, 707 (N.D.Ill.1986) (App. B-8 to Petition), and the Court of Appeals made no finding of racial animus, as discussed below in the Procedural History.

The record is clear, and Stevens herself admitted at trial (T. 1069-89),[1] that the Parents were genuinely concerned about two non-racial issues: (1) the quality of education of their children at the Mollison School, and (2) their children's safety during school hours from the influence of the street gangs, which run rampant in the neighborhood surrounding Mollison.

With respect to quality of education, it was undisputed at trial that in 1978-1980, Stevens's school failed to teach children basic skills. For example, in 1978, more than *90%* of the students at *every* grade level were below their age-appropriate reading level. (Joint Ex. 1) This was not simply

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[1] References to the transcript are denoted below as "T. ____." References to plaintiff's exhibits are denoted as "PX ____," while defense exhibits are denoted as "DX ____."

because Mollison was in a poor neighborhood, since schools of comparable poverty rank averaged only *50-60%* below level. (*Id.*) Stevens's superior, Dr. Bryan, rated Stevens in the bottom 25% of principals in his district because of her school's poor academic performance in 1978-1979. (PX 9-11; T. 193, 210-22, 229-38)

With respect to the safety of students, in 1980 Mollison had an "open campus" policy, under which students were sent home unsupervised during lunch. (T. 660-66, 970-87) Stevens and the Parents agreed that this system endangered the children, who were subject to attack, accident, or gang recruitment as they walked home and back during lunch. (T. 970-77, 1099) The Parents wanted a "closed campus" like many other schools, where children ate lunch at school, supervised by teachers.

The defendant Parents, as well as many other parents, organized around both the education and safety issues. During November and December of 1980, they met with Stevens, teachers, and then spoke at the Chicago Board of Education's (the "Board") formal monthly meeting to air their grievances. During this time, there was never any mention of removing Stevens, but only of the poor education and lack of safety at the school. (T. 2490-2624; DX 26-31)

Finding no response to their concerns from the Board or Stevens's superior, Dr. Frank Gardner, the Parents organized a one-week boycott of classes, during which they peacefully picketted and leafletted. The boycott did not seek Stevens's removal or even criticize her. The boycott ended when Dr. Gardner agreed (1) to investigate the school's poor educational performance, and (2) to allow the Parents to supervise their children at lunch on school property. (T. 2384, 2548, 2555-56; DX 17, 18, 26-31)

The Parents did not seek Stevens's transfer from Mollison until *after* Stevens resisted the compromise worked out by Dr. Gardner. The Parents found Stevens ultimately resistant to meaningful change in the school. (*e.g.*, T. 2560) Specifically, she was unwilling to change the system by which students were tested so that they could advance through the curriculum. (T. 1105-10) Stevens's own witness found this system improper, and shortly before her transfer, Dr. Gardner had ordered Stevens to change the testing system.[2] (T. 224 and see T. 2388) Also, Stevens could not persuade teachers to adopt a full closed campus system, and she could not come up with alternatives.[3] Thus, the safety issue also remained unresolved.

After the Parents staged a sit-in in Stevens's office,[4] Stevens took a voluntary two month, paid leave of absence, and returned to the Chicago system as principal of another school, receiving a raise in salary. She retired

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[2] Dr. Gardner and School Superintendant Caruso each prepared formal reports which were critical of both the open campus policy and the manner in which Stevens had administered the academic program at the school. (DX 17, 18)

[3] The teacher's union contract gave the teachers control over this issue. However, as discussed below, Stevens's replacement at Mollison, Dr. Dervin, creatively manipulated the teachers' schedules to impose a *de facto* closed campus system at the school.

[4] While Stevens alleges that threats were made during the sit-in in the principal's office, Petition at 4, that fact is in dispute. What is not in dispute is that no one physically barred Stevens from her office, touched her, or said they would harm her. Dr. Gardner and the press were present at all times. (T. 886-907, 2394-95, 2610-18, 2959) A member of the press testified that Stevens appeared calm and unshaken. (T. 2956-57) *No* evidence shows that the Parents were arrested four times or that they were arrested for assault, contrary to the implications in the Petition at 4. The one arrest following the sit-in was for trespass. (T. 2960) Charges were dropped. (App. A-2)

in 1985 at age 65. (T. 1089-95) Contrary to Stevens's assertion in her Petition at 5, she never testified, and no evidence suggests, that she retired early because of the events that had occurred at Mollison *four years* before her retirement.

No evidence suggests, and Stevens has never argued, that any Board of Education actor responsible for Stevens's transfer was motivated by race, influenced by race, or believed that any of the Parents were motivated by race. The evidence in the record is clear that no state actor acted under any racial motive of any kind. Stevens never sued the Board.

It is also undisputed that the Parents never asked that Stevens be removed because she is white or asked that she be replaced by a black principal. (DX 26-33; T. 2163-66) Stevens herself admitted that the Parents had non-racial complaints and motivations. (T. 1069-89) While Stevens's replacement, Dr. Dervin, is Black, the record shows that the Parents met immediately with her, *and told her that if she did not satisfy the Parents' concerns, they would seek her removal just as they had sought Stevens's removal.* (T. 2163-66) In fact, Dr. Dervin made prompt changes on both the testing and safety issues. (T. 2172-2228) She restructured the testing system and classrooms, and imposed a modified "closed campus" system, over teacher objections. The changes satisfied the Parents.

If the Parents had simply wanted a Black principal, as Stevens claims, their activity would have ended at this point. But they remained active in school affairs despite Stevens's departure, broadening their focus from educational reform at Mollison to reform of the Chicago Public School system as a whole. Defendants and other parents formed a not-for-profit organization called The Parent

Equalizers of Chicago, whose purpose was to educate other Chicago parents as to School Board policy and assist them in monitoring the way in which their own schools were run. (DX 19, 21-25; T. 2961-73) This group was founded and operated *after* Stevens had been transferred from Mollison.

B. Procedural History

After the Complaint was filed, the Parents moved to dismiss the claim under §1985(3), arguing, among other things, that the claim was not predicated on the violation of some cognizable federal right. The Parents relied on such cases as *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818 (7th Cir. 1975) (Stevens, J.), *cert. denied*, 425 U.S. 943 (1976), and *Murphy v. Mt. Carmel High School*, 543 F.2d 1189 (7th Cir. 1976), cases whose reasoning was ultimately adopted by this court in *Carpenters v. Scott*, 463 U.S. 825, 832 (1983).

The first District Judge assigned to the case denied the Motion to Dismiss, holding that a §1985(3) claim predicated on a denial of equal protection need not allege state action. 568 F.Supp. 289, 293 (N.D.Ill. 1983) (App. C-6)[5] The Parents moved to reconsider under the authority of *Scott*, which had been decided two days before the District Court's ruling. The Court vacated its previous decision as "an error in light of *Scott*," but still denied the Motion to Dismiss, holding that the state action requirement of *Scott* was met because the "aim of the conspiracy" was to "influence" a state actor, the Board, to remove Stevens. *See* App. E-2 to E-3. However, Stevens *abandoned* this precise issue until filing the Petition. Throughout trial,

[5] In citing to the lower court opinions in this case, this Response will refer to the pages in the Appendix to the Petition.

arguments on directed verdict, and on appeal to the 7th Circuit, Stevens never argued that the state action requirement was met because the Parents merely aimed to "influence the State."

At the close of Plaintiffs' case, the Parents moved for a directed verdict, arguing, among other things, (1) that their organizational petitioning, leafletting and boycotting activities immunized them from liability under the authority of *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982), and *Stern v. United States Gypsum*, 547 F.2d 1329 (7th Cir. 1977), *cert. denied*, 434 U.S. 975 (1977); and (2) that Stevens had not shown that at least *two* Defendants shared the racial animus required to make out a conspiracy claim under §1985(3). On the first argument, the District Court agreed with the Parents that all of their activities were protected under *Claiborne Hardware* except for, perhaps, the sit-in, upon which it reserved ruling pending further briefing as to whether the evidence in the case disclosed any threats of violence. 661 F.Supp. 702, 705-06 (N.D.Ill. 1986) (App. B-3 to B-7)

With respect to evidence of racial intent, the District Court found it to be a "difficult issue." *Id.* at 707 (App B-8) It denied the directed verdict at that time under authority holding that "if it has doubts about whether to grant a motion for a directed verdict, the better practice is to deny the motion and let the jury return a verdict." *Id.* (App. B-9) Contrary to the implications in the Petition, the District Court never made any finding of racial animus. Neither did the Court of Appeals.[6]

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[6] While Stevens implies that the Court of Appeals made a finding of racial animus, Petition at 4, it of course did no such thing. It *assumed*, because it was reviewing the grant of a motion for directed verdict, that one defendant, Tillman, was motivated by racial animus. 855 F.2d at 405 (A-21). The Court did not rule on the sufficiency of the evidence with regard to racial animus.

At the close of all of the evidence, the Parents again moved for a directed verdict, raising the two previous arguments, but also arguing that Stevens had not proved a violation of any cognizable federal right. Stevens argued that the conspiracy deprived her of certain state-created rights, and "her right under the Fourteenth Amendment to equal protection." Following the Court's decision in *Great American Fed'l Savings & Loan v. Novotny*, 442 U.S. 366 (1979), the District Court granted the motion for directed verdict because Stevens had not identified a violation of a federally protected right.[7] *Stevens v. Tillman*, No. 81 C 3588, slip op. at 2-7 (N.D.Ill. Dec. 16, 1986) (App. D-2 to D-6). Because of its ruling, the Court did not need to revisit the *Claiborne Hardware* issue or reconsider the evidence showing that the Parents lacked racial animus. (App. D-7)

On appeal, Stevens continued to argue that state-created rights may be asserted via §1985(3), and also that she had shown an equal protection violation. But she did *not* argue that the state action requirement of the Fourteenth Amendment could be met by showing that the conspiracy was merely aimed at influencing the State. In affirming the District Court, the Court of Appeals applied "the accepted

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[7] The Court voiced its frustration with Stevens on this issue, stating in a footnote (App. D-6, n.4):

> The Court has been generous in its attempt to discern just what rights the Plaintiff is asserting have been violated .... The Court expects, however, that by the time the case reaches the trial stage, the Plaintiff's claims would be more refined than at the pleading stage. In this case, the Court's specific requests for precise definition of the §1985(3) claim and case law in support repeatedly were met by conclusory arguments on the part of Plaintiff's counsel. This, as well as the extent of the directed verdict motions, has made the Court's rulings on these motions particularly difficult.

understanding" of this Court's most recent §1985(3) cases, (App. A-23), and held that Plaintiff had not proved that the alleged conspiracy deprived her of some federally protected right. 855 F.2d at 404-05 (App. A-20 to A-21) In doing so, the Court held (though the issue was not specifically raised in Stevens's brief) that a conspiracy to influence the State would not satisfy the state action requirement of the Fourteenth Amendment and *Scott* when the State had not acted in a prohibited way and caused no cognizable injury to Stevens. 855 F.2d at 404-05 (App. A-20 to A-21).

In dictum, the Court suggested that a mere desire to influence the State might be protected under the so-called *Noerr-Pennington* doctrine, which is essentially the same as the *Claiborne Hardware* analysis. 855 F.2d at 404-05 (App. A-21). But the Court did not need to reach this issue since Stevens had not argued or shown that the Board of Education had violated any of her rights, and the Court had correctly ruled that some improper state action was required under Stevens's Fourteenth Amendment theory. Her alleged injuries came from purely private conduct.

REASONS FOR DENYING THE WRIT

I.

THIS CASE INVOLVES A STRAIGHTFORWARD APPLICATION OF THIS COURT'S PRECEDENT. IT RAISES NO QUESTIONS OF UNUSUAL SIGNIFICANCE, CREATES NO CIRCUIT CONFLICT, AND IN ANY EVENT, WAS CORRECTLY DECIDED BELOW.

This Court has already decided and settled the legal principles necessary to resolve this case. The Court of Appeals faithfully applied those principles to the facts, and in so doing created no circuit conflict and generated no confusion in the law. This Court's intervention is unwarranted.

A. The Petition Raises No Novel or Significant Issues of Interpretation of 42 U.S.C. §1985(3).

In three opinions, the Court has defined the contours of a claim under §1985(3). While the statute itself does not require state action, *see Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971), the statute also creates no rights of its own force. It is merely remedial, and the rights §1985(3) protects "must be found elsewhere." *Carpenters v. Scott*, 463 U.S. 825, 833 (1983). That "elsewhere" is in *federal* law. A §1985(3) remedy exists only "when some otherwise defined federal right—to equal protection of the laws or equal privileges and immunities under the laws—is breached by a conspiracy in the manner defined by the section." *Great American Federal Savings & Loan v. Novotny*, 442 U.S. 366, 376 (1979); *see also, id.* at 379 (Powell J. concurring) (limiting §1985(3) to fundamental federal *constitutional* rights); *id.* at 388 (White, Brennan and Marshall, JJ. dissenting) ("the words 'equal privileges

and immunities' in §1985(3) refer to substantive rights created or guaranteed by other federal law, be it the Constitution or federal statutes other than §1985(3) . . ."). Thus, when the federal right sought to be vindicated through §1985(3) requires "state action," plaintiff must prove state action in such a case to recover. *Carpenters v. Scott*, 463 U.S. at 833. Such a result necessarily follows from the fact that §1985(3) creates no rights of its own force.

The lower courts, including the ones in this case, have uniformly and consistently applied these principles.[8] Given such uniformity and consistency, this case raises no issue significant enough for this Court to grant certiorari.

B. The Court of Appeals Properly Applied Settled Principles of This Court's Precedent to the Facts of This Case.

The principles of this Court's cases apply to the facts of this case in a straightforward way. Stevens's allegation that the conspiracy deprived her of various state-created rights does not satisfy *Novotny* and *Scott*'s clear federal right requirements. In any event, Stevens's Petition fails to assert, and she apparently abandons, her

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[8] *See McNutt v. Duke Precision Dental & Orthodontic Labs, Inc.*, 698 F.2d 676, 680 (4th Cir. 1983) (no state action where private actors tried to influence state actor); *Martinez v. Winner*, 771 F.2d 424, 440 (10th Cir. 1985) (§1985(3) requires deprivation of some independent federal right); *Mahoney v. National Org. For Women*, 681 F.Supp. 129, 134 (D.Conn. 1987) (dismissing §1985(3) claim based on First Amendment for lack of state action); *Burrell v. Bd. of Trustees of Georgia Military College*, 696 F.Supp. 1522, 1524 (M.D. Ga. 1988) (applying traditional state action doctrine to §1985(3) claim); *Havas v. Thornton*, 609 F.2d 372, 374 (9th Cir. 1979); *Thompson v. Machinists*, 580 F.Supp. 662, 667 (D.D.C. 1984); *Kinniburgh v. Burlington Northern R. Co.*, 568 F.Supp. 655, 656-57 (D.Mont. 1983).

theory that she could base a violation of §1985(3) solely on state-created rights.[9]

The only Federal right she identifies in her Petition is the Fourteenth Amendment right to equal protection of the laws. But because §1985(3) creates no rights, to prevail Stevens must meet the elements of an equal protection violation, which of course in this context must include state action, and intentional discrimination by the state actor. *See, e.g., Washington v. Davis*, 426 U.S. 229, 238 (1976). She has met neither element.

No evidence suggests, and Stevens had not alleged, that any state actor had any racial intent or believed that any of the Parents acted with racial intent. Stevens's equal protection theory, and her §1985(3) claim based on it, must therefore fail. This clear intent issue suffices to dispose of the case.

Stevens alleges that only the Parents, not the Board, acted with racial animus. While she has failed to prove this, *see* Statement of the Case above and Section II

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[9] Her theory rested on *Life Ins. Co. v. Reichardt*, 591 F.2d 499 (9th Cir. 1979), which, as the Court of Appeals below ruled, "preceded both *Novotny* and *Scott* and is inconsistent with them . . ." 855 F.2d at 405 (App. A-22). *Reichardt* has been ignored even in the Ninth Circuit. *Havas v. Thornton*, 609 F.2d 372, 274 (9th Cir. 1979) (plaintiff must show deprivation of federal right); *Kinniburgh v. Burlington Northern R. Co.*, 568 F.Supp. 655, 656-57 (D.Mont. 1983). Other courts have also uniformly declared Reichardt dead in light of *Novotny* and *Scott*. *See Thompson v. Machinists*, 580 F.Supp. 662, 667 (D.D.C. 1984); *Shaare Tefila Congregation v. Cobb*, 606 F.Supp. 1504, 1509-10 (D.Md. 1985), *aff'd*, 785 F.2d 523 (4th Cir. 1986), *rev'd on other grounds*, 481 U.S. 615 (1987). Because *Reichardt* has been superseded by authority from this Court, as well as by authority from within the Ninth Court, it presents no genuine Circuit conflict. In any event, the Petition does not advance a theory grounded in *Reichardt*.

below, this private racial animus does not make out a predicate violation of the Fourteenth Amendment. Stevens fails to (and cannot) assert that she has satisfied this Court's current definition of state action required by the Fourteenth Amendment. Even a cursory review of this Court's state action jurisprudence shows that state action is clearly absent, since state action requires that state actors actively encourage, coerce or become entangled in a legal violation: "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 839-43 (1982).

C. The Petition Misreads the Lower Court's Opinion And Fails to Identify Any Conflict of Lower Court Opinion, or, Indeed, Any Authority In Support of Petitioner's Theory of Relief.

The Petition takes two tacks in arguing that Stevens's Fourteenth Amendment theory is worthy of this Court's attention. Her primary argument for certiorari is that the lower court imported a "property right" requirement into the Equal Protection Clause. Petition at 6. The Court of Appeals did no such thing. The Court first looked for a federal predicate outside the equal protection clause. It merely found, in so doing, that Stevens had not shown that the *Board* deprived her of *any* rights, including any property right or other federal entitlement. 855 F.2d at 404-05 (A-20 to A-21). This was a proper rejection of Stevens's argument to the Court of Appeals that she had some independent federal right not to be transferred from Mollison School to another school. It then turned to the state action issue, part of Stevens's equal protection claim.

It found, correctly, no state action. The Court did *not* hold or imply that the equal protection clause has a "property right" requirement. Stevens never argued (and still has not argued) that the *State* deprived her of equal protection of the laws, regardless of her "property rights" or otherwise. Her equal protection claim thus must fail, as the Seventh Circuit correctly held. Stevens's first reason for certiorari, then, falters on a misconstruction of the lower court's ruling; it provides no basis for granting the Writ.

Stevens second tack is to assert that the lower court misread the state action ruling in *Scott*. But the appellate court's application of *Scott* and other relevant precedent was correct and straightforward. It identified three kinds of conduct within the reach of §1985(3). 855 F.2d at 404 (A-19 to A-20). These three categories are faithful to this Court's precedent, and do not present any reason to reexamine that precedent. The interpretation conflicts with no other Circuit authority.

Stevens's Petition, and her theory of relief, rises and falls on her assumption that this Court in *Scott* broadened the state action requirement of the Fourteenth Amendment *sub silentio* when it wrote in dictum that a conspiracy aimed at "influencing" the State could constitute state action. 463 U.S. at 830. Stevens cites no authority for this interpretation. Indeed, to our knowledge, other than the first district judge in this case, no court has ever reached such a holding. Not only did the Court of Appeals reject this theory, the Seventh Circuit has previously rejected it in dictum as well. *See Grimes v. Smith*, 776 F.2d 1359, 1367 n.16 (7th Cir. 1985). Stevens's theory is thus legally unfounded.

D. Certiorari Is Improper Because Stevens's Interpretation Of *Scott* Has Not Received Adequate Development In This Case And In The Lower Courts Generally.

It is "desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening." *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-18 (1950) (Frankfurter, J.) Not only does Stevens's novel interpretation of *Scott*—that it changed state action doctrine—lack authority, it is not ripe for this Court's attention. The very few courts that have addressed the precise issue—*Grimes*, this case, and *McNutt v. Duke Precision*, 698 F.2d at 680—have done so consistently. Moreover, the scarcity of opinions on this issue suggests that it contemplates a fact situation too rare to be worthy of this Court's time and guidance.[10] At the very least, the prudent course would be to wait and allow §1985(3) to continue to be tested in the lower courts, to see whether a conflict or important, recurring issue of interpretation is raised later.

Finally, certiorari is improper because Stevens's interpretation of the *Scott* dictum was not fully fleshed out in the courts below. She did not argue her theory during the hearing on directed verdict or during the appeal. Accordingly, the Parents did not fully argue the issue before the Court of Appeals. The Court of Appeals reached the issue without prompting from Stevens. Thus, certiorari is particularly improper in this case because not only has

[10] The cases footnoted above in n.8, except for *McNutt*, do not hold that a conspiracy to influence the State, without more, may or may not state a claim. They all require a federal predicate, and they apply current state action doctrine if the federal predicate requires state action. *McNutt* holds that a conspiracy to influence the State, without more, fails to state a claim. It is consistent with the lower court rulings in this case.

the *Scott* dictum failed to receive development in the lower courts generally, it was not even fully vented and developed in the courts below. *See City of Springfield v. Kibbe*, 480 U.S. 257 (1987) (dismissing writ as improvidently granted even though court of appeals briefly addressed issue, where petitioner had not argued or raised issue to court of appeals).

E. Stevens Misreads the Court of Appeals Opinion In Suggesting That the Relevant Law Under §1985(3) Is Unclear.

The Court of Appeals did not, as suggested in Petition at 12, express doubt about the correctness of its interpretation of this Court's precedent. It followed the "*accepted* understanding of §1985(3)" as set forth in that precedent. 855 F.2d at 405 (A-23) (emphasis added). The Court referred to flux in §1985(3), but in so doing, it *never* said or implied that this Court's rulings in *Novotny* or *Scott* were confusing or in need of elaboration. Rather, it described the *statutory language* as "opaque." A-19. The "changing interpretations" the Court mentioned referred to changes in the scope of actionable *non*-racial animus, an issue not raised in this case. A-22. Finally, when it said that it could not "pretend certainty" as to whether the "accepted understanding" is "right," the Court merely meant that with a Century-old statute as obscure as §1985(3), no one could ever be certain about legislative intent. Whatever the meaning of the *statute's* "opaque" words, *this Court* has given the statute a definitive meaning, as shown above in Section I.A. The Court of Appeals did not express *any* doubts as to how to read *this Court's* construction of §1985(3). As shown earlier, that construction is not in doubt, and Stevens offers no case showing that it is.

Indeed, if Stevens were right about "confusion," one might expect her to offer *even one* case after *Scott* holding that §1985(3) should be read as she wishes. She offers none. One might expect *some* lower court conflict on this issue. She identifies none. In short, the relevant law is not confused, and the Court of Appeals did not in effect confess ignorance as to the proper reading of this Court's precedent. Certiorari should be denied.

F. This Case Has Little Significance Except to the Parties. It Raises No Important Federal Claims Deserving This Court's Attention.

Stevens may personally feel she was "victimized," but so does every plaintiff who "cries out for justice" to this Court. Petition at 13. The Parents feel just as strongly that they acted rightly in the interests of their children, acted without racial intent, and acted without violating Stevens's rights. But this dispute on the facts is not a proper basis for granting the Writ. While the facts belie the claims of Stevens of race discrimination, the issue for this Court is whether Stevens has raised a significant *federal* issue. As shown above, she has not. She could have brought her assault theory and sought her "justice" in State Court, rather than seeking to use §1985(3) to federalize State tort law. Her cries for justice are important to her; the Parents' cries for justice and for their children are important to them; but neither cry is of national significance.

Stevens's closing rhetorical gambit of reversing the races of the parties, Petition at 13, would not lead to a different result on the merits or raise novel issues of national concern. This Court's precedent makes clear that *any* plaintiff using §1985(3), white or black, must allege the deprivation of an independent federal right. This is

easily done in virtually every instance of traditional "Klan-type" activity.[11] But Stevens has not done so here. Her personal failure to find a violation of a substantive federal right does not transform this case into one of "national importance."

II.

THE WRIT SHOULD BE DENIED BECAUSE THE ISSUE RAISED IS UNNECESSARY TO THE ULTIMATE RESOLUTION OF THE CASE: STEVENS WILL LIKELY LOSE ON OTHER GROUNDS.

The Parents have several meritorius arguments which render the result reached below correct without regard to the question raised for certiorari. Because the full trial record shows that this Court's ruling will not affect the ultimate outcome of the case, it would not be a prudent exercise of this Court's discretionary jurisdiction to hear this case.

First, the evidence against racial animus is overwhelming. The District Court had "doubts" about Stevens's *prima facie* evidence of racial animus *before* the Parents even introduced their evidence. *See* 661 F.Supp. at 707 (App. B-8 to B-9). The District Court did not need to reach this factual issue at the close of the evidence. It is quite probable that Stevens could not survive another directed verdict motion on this issue. The Parents' conduct

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[11] For example, paradigmatic Klan activity usually is aimed at interfering with the right to vote, the right to travel, the right to equal housing opportunity, the right to access to public accommodations, all of which are protected against private action by the federal constitution or federal statute. The "second category" of §1985(3) violations defined by the Court of Appeals, (App. A-20) covers such typical Klan activity and belies Stevens's parade of horribles in her Petition.

was fundamentally at odds with racial motivation. For example, they immediately threatened to remove Stevens's *black* replacement if she proved unresponsive to their concerns about education and safety. They formed a city-wide parents' rights group around these issues long after Stevens was transferred. This conduct is inexplicable if the Parents simply wanted a black principal. These facts were not yet fully before the District Court when it already had "doubts" about plaintiff's evidence of racial animus. Where, as here, the facts developed after a three-week trial cast substantial doubt on the existence of the factual linch-pin (racial animus) of Plaintiff's purported federal claim, granting a writ premised on such a fact is improper. *Cf. Belcher v. Stengel*, 429 U.S. 118, 119-120 (1976) (dismissing writ as improvidently granted where record disclosed substantial doubt as to factual premise of petition for certiorari).

Second, both the District Court and the Court of Appeals indicated that even assuming Stevens did prove racial animus (which she did not), she would likely lose under the immunity based on *Claiborne Hardware* and the *Noerr-Pennington* doctrine. *See* 661 F.Supp. at 705-06 (App. B-3 to B-7); 855 F.2d at 404-05 (App. A-21). Thus, this case would likely turn on issues other than those raised in the Petition, rendering the Court's intervention largely academic. Granting the Writ would be improper in such circumstances.

CONCLUSION

For the above reasons, Respondents respectfully request that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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